

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF SOUTH CAROLINA
3 CHARLESTON DIVISION

-----x
3 SUZANNE Q. LITTLE, :
4 :
5 Plaintiff, :
6 :
7 v. : No. 2-98-1879-23
8 :
9 BROWN & WILLIAMSON TOBACCO :
10 CORPORATION et al., :
11 :
12 Defendants. :
13 -----x

Washington, D.C.

Monday, March 13, 2000

11 Deposition of

12 JUDITH P. WILKENFELD

13 a witness, called for examination by counsel
14 for Defendant R.J. Reynolds, pursuant to
15 notice and agreement of counsel, beginning at
16 approximately 9:30 a.m., at the law offices
17 of Jones Day Reavis & Pogue, 51 Louisiana
18 Avenue, N.W., Washington, D.C., before Monica
19 A. Voorhees and Shari R. Broussard of Beta
20 Reporting & Videography Services, notary
21 public in and for the District of Columbia,
22

1 when were present on behalf of the respective
2 parties:

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19 ALSO PRESENT:

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Stephen Beresheim

21
22 * * * * *

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P R O C E E D I N G S

Whereupon,

JUDY WILKENFELD

was called as a witness and, having been
first duly sworn, was examined and testified
as follows:

EXAMINATION BY COUNSEL FOR DEFENDANT
BY MS. PARKER:

Q Ms. Wilkenfeld, good morning.

A Morning.

Q I met you a few minutes ago outside
in the waiting area. My name is Stephanie
Parker and I represent R.J. Reynolds Tobacco
Company and I'll be asking you your questions
today.

Now, if you at any time don't
understand a question that I ask, please tell
me and I'll try to rephrase it. Or if you
have trouble hearing what I'm trying to say,
let me know and I'll try to speak louder or
if you want to take a break at any time,
please let me know, all right.

1 One other thing, there is a local
2 rule in South Carolina that prohibits
3 discussions regarding the deposition during
4 the breaks, so I'd just like to ask you not
5 to have any discussions regarding the
6 substance of your testimony during any of the
7 breaks, all right?

8 A Okay.

9 Q Could you just state your name,
10 please, for the record?

11 A Judith Wilkenfeld.

12 Q You live here in [DELETED]?

13 A Yes.

14 Q What's your address, please?

15 A [DELETED].

17 (Wilkenfeld Deposition Exhibit
18 No. 1 was marked for
19 identification.)

20 BY MS. PARKER:

21 Q Let me show you what we've marked
22 as Exhibit 1 which is the CV that you gave to

1 us previously.

2 MS. PARKER: Charles, would you
3 like a copy?

4 MR. PATRICK: No, I have one, thank
5 you.

6 BY MS. PARKER:

7 Q Tell you that you're welcome to
8 refer to that, I'm going to ask you some
9 questions about your background.

10 Now, you're a lawyer; is that
11 correct?

12 A Yes.

13 Q You worked for the Federal Trade
14 Commission at one point in time; is that
15 correct?

16 A Yes.

17 Q The Federal Trade Commission is
18 known as the FTC?

19 A Right.

20 Q You also worked for the Food and
21 Drug Administration at one point in time
22 also?

1 A Yes.

2 Q The Food and Drug Administration is
3 referred to as the FDA, correct?

4 A Right.

5 Q Now, I understand that in college
6 you majored in political science; is that
7 correct?

8 A Yes.

9 Q Then you went on and got a law
10 degree from the Indiana University School of
11 Law?

12 A Yes.

13 Q After you graduated from law
14 school, you taught at the school for two
15 years?

16 A Yes.

17 Q What did you teach?

18 A I taught a course in Appellate
19 advocacy with, we used tort law, so it was a
20 legal writing advocacy course.

21 Q Then for the next I believe 11
22 years, from 1969 until 1980, you worked in

1 the field of labor law; is that correct?

2 A Correct.

3 Q You served as a trial attorney at
4 the National Labor Relations Board, Office of
5 General Counsel; is that correct?

6 A Correct.

7 Q Then you served as an attorney at
8 the Federal Labor Relations Authority Office
9 of the Solicitor; is that correct?

10 A Right, with a break of two years.

11 Q I understand from your CV that
12 you've also served as a mediator here in the
13 Federal Court in the District of Columbia for
14 cases involving labor disputes?

15 A Yes. I ceased doing that in 1994,
16 I think it was, when I went out to FDA and I
17 recently started doing mediation again.

18 Q In labor cases?

19 A No, now I can do mediation in any
20 case. As a Government attorney, I had
21 restrictions as to what I could mediate.

22 Q But now you can mediate all types

1 of cases?
2 A I can mediate any cases, yes.
3 Q Are you currently a member of the
4 D.C. Bar?
5 A Yes.
6 Q Now we've gone over what you have
7 done, I want to ask you some questions just
8 to rule out for me some areas where you are
9 not qualified as an expert, okay.
10 You're not a doctor, correct?
11 A I'm not a doctor.
12 Q You have no formal training in any
13 medical science; is that correct?
14 A Correct.
15 Q You have never taken any classes in
16 medicine?
17 A Correct.
18 Q You're not qualified as an expert
19 in cardiology?
20 A Correct.
21 Q So you won't be giving an opinion
22 in the Little case regarding any matters

1 relating to cardiology?
2 A Correct.
3 Q You're not qualified as an expert
4 in pathology, correct?
5 A Correct.
6 Q Again, you won't be giving an
7 opinion in the Little case in any matters
8 relating to pathology?
9 A Correct.
10 Q You're not qualified as an expert
11 in oncology, correct?
12 A Correct.
13 Q Again, you won't be giving an
14 opinion in the Little case regarding any
15 matters relating to oncology?
16 A Correct.
17 Q You're not qualified as an expert
18 in oncogenesis; is that correct?
19 A Correct.
20 Q You won't be giving an opinion in
21 the Little case regarding any matters
22 relating to oncogenesis?

1 A Correct.

2 Q So you don't know what compound or
3 even what amount of any compound allegedly
4 causes lung cancer, correct?

5 A Correct.

6 Q You're not qualified as an expert
7 in epidemiology?

8 A Correct.

9 Q So you won't be giving an opinion
10 in the Little case regarding any issues
11 relating to epidemiology?

12 A I'm not an expert in that area.

13 Q Same question with respect to
14 addiction, you're not qualified as an expert
15 in addiction, correct?

16 A Correct.

17 Q You won't be giving an opinion in
18 the Little case regarding any matters
19 relating to addiction?

20 A Well, you keep saying relating to.
21 I can't give an expert opinion about
22 addiction.

1 Q You're not qualified as an expert
2 in toxicology?

3 A Correct.

4 Q So, again, you wouldn't be giving
5 an opinion in the Little case relating to any
6 matters where you have given an opinion
7 relating to toxicology?

8 A Correct.

9 Q You're not qualified as an expert
10 in statistics?

11 A Correct.

12 Q You are not qualified as an expert
13 in the constituents of cigarette smoke?

14 A Can you explain that one further?
15 I ran the, I oversaw the FTC tar, nicotine
16 testing laboratory for, I don't know, what
17 was it, '83 to '94, 11 years, so I'm not an
18 expert on constituents of smoke, but I'm
19 certainly knowledgeable about some of the
20 questions involved with the testing, so it's
21 sort of a broad, a little broad. Can you
22 narrow it?

1 Q All right, let me see if I can do
2 that. You're not qualified as an expert in
3 the constituents of cigarette smoke?
4 A Chemistry of?
5 Q The chemistry, that's correct.
6 A That's correct.
7 Q You're not qualified as an expert
8 in statistics or biostatistics?
9 A Correct.
10 Q So you would not be giving an
11 opinion in the Little case relating to
12 statistics or biostatistics, correct?
13 A Correct.
14 Q You're not qualified as an expert
15 in chemistry, correct?
16 A Correct.
17 Q You're not qualified as an expert
18 in genetics?
19 A Correct.
20 Q You're not qualified as an expert
21 in psychology?
22 A Correct.

1 Q Or psychiatry?

2 A Correct.

3 Q Or pharmacology?

4 A Correct.

5 Q So you would not be giving an
6 opinion in the Little case relating to
7 chemistry, genetics, psychology, psychiatry
8 or pharmacology, correct?

9 A Correct.

10 Q So you have no expertise in any
11 scientific discipline; is that correct?

12 MR. PATRICK: I'm going to object
13 to the question, but she can answer it.

14 THE WITNESS: Right, I certainly
15 don't have expertise in the areas you've
16 mentioned.

17 BY MS. PARKER:

18 Q Well, are there any areas of
19 scientific discipline where you think you are
20 an expert?

21 A I guess it depends what you mean by
22 science.

1 Q Do you have an understanding of the
2 word science?

3 A Well, you know, I can certainly
4 rule out every science that you've mentioned.
5 I mean if there are others, I can tell you
6 yes or no. I mean my training and background
7 is as a lawyer.

8 Q Sitting here today, does any
9 scientific discipline come to mind to you
10 where you think you are qualified as an
11 expert?

12 A With the caveat that the type of
13 areas you've mentioned, then, no, I'm not an
14 expert in those.

15 Q You're not an expert in
16 communications, correct?

17 A Communications. That was a harder
18 one. Federal Trade Commission, its division
19 of advertising practices oversees the
20 regulation of advertising at a national
21 level. The commission is sort of endowed by
22 the statute with expertise. The expertise is

1 granted to the Commissioners, but it is
2 exercised by the staff. In doing that, we do
3 a lot with communications.

4 So if you want to parse it more
5 narrowly, perhaps we could. I don't have a
6 degree in communications.

7 Q Do you have any training in
8 communications?

9 A On-the-job training.

10 Q Is that the end of your answer?

11 A That was the end of my answer.

12 Q Have you published any literature
13 on the area of communications?

14 A Only the one article, I think it's
15 the second one in my publications, Use of
16 Extrinsic Evidence by FTC in Advertising
17 Cases that was presented at the American
18 Psychological Association.

19 Q Have you ever taught any courses on
20 communications?

21 A No.

22 Q Are you a member of any

1 professional societies in the area of
2 communications?

3 A Well, I've been on the board of any
4 number of journals that cater to that field.
5 I'm currently on the board of editors of the
6 Journal of Public Policy and Marketing. I
7 often speak at their, at their annual
8 meetings and I don't consult in the sense of
9 on a fee basis, but I am sort of an of
10 counsel type. How can I describe this?

11 My views are sought on certain
12 issues in those areas by various journals and
13 by various professors.

14 Q Do those areas relate to
15 advertising?

16 A Yes.

17 Q Do you consider yourself as an
18 expert on any area of communications other
19 than advertising?

20 A If you mean by advertising
21 advertising and marketing, no, I don't.

22 Q You're not an expert in cigarette

1 design, correct?

2 A Yeah, that's -- I'm not.

3 Q Now currently you're listed on your
4 CV as being a public health policy
5 consultant; is that correct?

6 A Yeah.

7 Q What is the name of the committee
8 you work for?

9 A Okay, I have actually two
10 positions. The committee on tobacco product
11 change of which I'm the chair is a pro bono
12 job. It is a group of volunteers that are
13 interested in the same subject.

14 My full-time consulting is now with
15 the Campaign for Tobacco Free Kids. I'm the
16 director of the WHO framework convention
17 initiative founded by the Robert Wood Johnson
18 foundation.

19 Q So, do you receive any income from
20 the committee on tobacco product change?

21 A No.

22 Q Does anyone, any of your other

1 members of the committee, does anyone receive
2 any income from the committee on tobacco
3 product change?

4 A No.

5 Q Now, do you do consulting work for
6 the Campaign for Tobacco Free Kids or is that
7 solely through the committee for tobacco
8 product change?

9 A At the time that this CV was
10 written, I had just retired from the Food and
11 Drug Administration and was going to do
12 part-time consulting, and this reflects that.

13 The committee on tobacco product
14 change is an interest of mine and, therefore,
15 is listed, we were looking for funding, we
16 were probably still looking for funding.

17 In the meantime, I was approached
18 by the Campaign for Tobacco Free Kids to do
19 some consulting for them and then to take
20 over the directorship of the WHO framework
21 initiative.

22 I do the WHO work as a consultant

1 and not as an employee.

2 Q Sitting here today, are you an
3 employee with any organization?

4 A No.

5 Q So you're a consultant for both the
6 committee for tobacco product change and a
7 consultant --

8 A Well consultancy implies money,
9 then I'm not a consultant to the committee on
10 tobacco product change. I'm the chair of a
11 committee. All of us, as I say, are
12 volunteers. This is something that we do.
13 The campaign gives us space and we get, we
14 have a small start-up administrative fund
15 from Smith, Kline, Beecham.

16 Q So you're a consultant for the
17 Campaign for Tobacco Free Kids?

18 A Right.

19 Q Your work today as an expert
20 witness in the Little case, are you doing
21 that through the Campaign for Tobacco Free
22 Kids?

1 A No.
2 Q Are you doing that through the
3 committee on tobacco product change?
4 A No.
5 Q So this is something that you're
6 just doing separately, on your own?
7 A Right. Correct.
8 Q Is the Campaign for Tobacco Free
9 Kids a 501(c)3 corporation?
10 A Yes.
11 Q I believe you mentioned the
12 committee on tobacco product change has been
13 unable to find funding so far; is that
14 correct?
15 A I guess you could put it that way,
16 right.
17 Q Who are your clients that you do
18 work for on a consulting basis?
19 A I'm doing some work for Ness,
20 Motley, I've done some work for Smith, Kline,
21 Beecham; and now I'm basically full time with
22 the campaign and probably will devote all of

1 my time to the framework convention for the
2 next year or so and take on no new clients.

3 Q Tell me about your work for Smith,
4 Kline, what has that involved?

5 A It was a one day. They were
6 interested in hearing about advertising
7 issues related to a new, a new designation,
8 not a new designation, a new labeling for one
9 of their pharmaceuticals and since I had been
10 both at FDA and new advertising, they wanted
11 me to participate.

12 Q What pharmaceutical was that?

13 A I'm not -- I think that's
14 confidential, isn't it? I mean this is --

15 MR. PATRICK: I will assert an
16 objection at this point on the basis of
17 proprietary information on behalf of Smith,
18 Kline, Beecham, although I do not represent
19 that entity.

20 THE WITNESS: Thank you.

21 MR. PATRICK: But to the extent
22 that it would call for proprietary

1 information, I think the witness should
2 decline to answer.

3 THE WITNESS: Yeah. I can find out
4 from them if it's, but I assume that
5 something that's not on the market is
6 proprietary.

7 BY MS. PARKER:

8 Q So your only two clients for
9 consulting has been Smith, Kline and then the
10 plaintiffs' lawyers here, so far?

11 A Well, and Campaign for Tobacco Free
12 Kids. I did some consulting work for them
13 prior to taking on the full-time consulting
14 position of WHO.

15 Q Are you doing any work for the
16 plaintiffs' law firm, other than for the
17 Little case?

18 A No.

19 Q Have you done any general
20 consulting with the Ness, Motley firm
21 unrelated to a particular case?

22 A No.

1 Q How much do you charge for your
2 services as a consultant?

3 A As you can see, it's not a big
4 consulting career. I only retired in July
5 and I guess it varies.

6 For Ness, Motley, it's 400 dollars
7 an hour. For Smith, Kline I was paid for one
8 day, actually I haven't gotten the payment
9 yet so I don't quite know what it was. The
10 campaign was paying me 125 an hour and the
11 WHO, the WHO contract is 95,000 dollars for
12 the year.

13 So, that's a very broad range of
14 payment possibilities.

15 Q So you spent only the one day on
16 the Smith, Kline matter, correct?

17 A Uh-huh.

18 Q How much time have you spent on
19 this case?

20 A It's in here, just take -- not that
21 much, if I remember. You don't have those
22 files, do you?

1 MR. PATRICK: No.
2 THE WITNESS: It's in here, it will
3 just take me a minute.
4 BY MS. PARKER:
5 Q You're going through a couple of
6 stacks of documents that you brought with you
7 today.
8 A I was told to bring absolutely
9 everything and I did.
10 Q That's what you're going through?
11 A Uh-huh. You don't want just an
12 approximation, I take it. I mean the
13 approximation would probably be, certainly
14 under 30 hours.
15 Q Have you sent a bill to the
16 plaintiffs' firm?
17 A Uh-huh, I've sent several and I --
18 MR. PATRICK: Maybe we could find
19 it at a break, unless you want to go ahead?
20 THE WITNESS: Depends, it's up to
21 you. I mean do you want me to keep looking?
22 BY MS. PARKER:

1 Q We'll look at a break and then I'll
2 come back to that if you're not able to put
3 your hands on it.

4 A Actually, it's this file.

5 Q Well, if you've already found it
6 then, if you could tell me.

7 A Well as I say, I'm going to have to
8 sit down and add it up. So why don't I make
9 myself a note to add up the hours.

10 (Wilkenfeld Deposition Exhibit
11 No. 2 was marked for
12 identification.)

13 BY MS. PARKER:

14 Q Let me show you now what we've
15 marked as Exhibit 2 and ask you some
16 questions here.

17 Now, in 1983, the FTC brought a
18 lawsuit against Brown and Williamson Tobacco
19 Corporation regarding Barclay cigarettes,
20 correct?

21 A Correct.

22 Q Exhibit 2 is the brief that the FTC

1 submitted to the Federal Court here in
2 Washington in 1983; is that correct?

3 A Uh-huh.

4 Q You're listed as one of the
5 attorneys for the FTC on the brief?

6 A Correct.

7 Q Your resume states that you were,
8 in fact, the lead attorney for the Government
9 in that case?

10 A I was the lead attorney for
11 advertising practices. Medical Arlins and
12 Jerry Cummings were the general counsel's
13 office and I and Joel Winston and Elaine
14 Kolish were for the ad practices division.

15 Q So you were the lead lawyer?

16 A For ad practices. Lead attorney, I
17 also was the one who developed the case
18 from -- well, it had been in process up
19 until, I took the matter over in 1983 and I
20 became the lead attorney to present it to the
21 commission to get authorization to go to the
22 District Court.

1 Then when we went to the District
2 Court, co-counsel with the general counsel's
3 office.

4 Q So you were involved in preparing
5 that brief that has your name on it?

6 A Yes.

7 Q Were you a contributor to the brief
8 in terms of the writing?

9 A Long time ago. Our main scribner
10 would have been Joel Winston. We all
11 certainly contributed to the analysis. If I
12 had to tell you today what sentence I might
13 have written or not, I probably couldn't.

14 Q But it would be correct that you
15 were a major contributor to that brief?

16 A Certainly in its design and its
17 analysis.

18 Q So you reviewed the brief before it
19 was filed?

20 A Yes.

21 Q You gave the Government, the FTC
22 the benefit of your comments and suggestions

1 before it was filed?

2 A Absolutely.

3 Q The statements contained in that
4 brief that's been marked as Exhibit 2 were
5 truthful statements at the time they were
6 written, correct?

7 A They represented the opinions of
8 the Federal Trade Commission at the time the
9 brief was filed.

10 Q They were based on honesty held
11 beliefs of the FTC at the time it was filed?

12 A Absolutely.

13 Q Does it accurately set forth the
14 position of the FTC at that time?

15 A Yes.

16 Q You certainly would not submit a
17 brief to Federal Court with any false
18 statements in it, correct?

19 A No. The brief represents the
20 opinions of the Federal Trade Commission.
21 Government attorneys represent the client,
22 same as others, and this brief represents the

1 opinions of the Federal Trade Commission.

2 Q You subsequently filed a brief on
3 appeal in the District of Columbia Circuit
4 here in Federal Court, correct?

5 A Right, that's handled exclusively
6 by the general counsel's office.

7 Q Did you participate in the
8 preparation of that brief?

9 A We consulted and we reviewed, but
10 the work of the general counsel's office is
11 their work.

12 Q So you reviewed the brief on appeal
13 before it was filed?

14 A Correct.

15 Q Again, you would not allow a brief
16 to be filed on appeal in Federal Court if you
17 knew that there was something false or
18 misleading in the brief, correct?

19 A Yes, but again, the briefs
20 represent the opinions of the Federal Trade
21 Commission and they were honestly held by the
22 Federal Trade Commission.

1 (Wilkenfeld Deposition Exhibit
2 No. 3 was marked for
3 identification.)

4 BY MS. PARKER:

5 Q Let me show you now what we've
6 marked as Exhibit 3. You know Mr. John
7 Calfee, correct?

8 A I do.

9 Q You worked with him at the FTC,
10 correct?

11 A Correct.

12 Q When did he start at the FTC?

13 A I don't know.

14 Q Was he there when you started
15 in 1980?

16 A I'm pretty sure my first matter I
17 worked with John on, so he must have been
18 there. It was in the Bureau of Economics.

19 Q You respect Mr. Calfee; is that
20 correct?

21 A John and I have many differences of
22 opinion.

1 Q But do you respect him?

2 A Yes, I respect him.

3 Q He did good work at the FTC, didn't
4 he?

5 A I considered his work often biased.

6 Q Well his work was cited in the 1994
7 Surgeon General's Report, correct?

8 A Yes -- wait a minute, I have to
9 take your word for that, I don't know.

10 Q You don't know?

11 A No, I mean --

12 (Wilkenfeld Deposition Exhibit
13 No. 4 was marked for
14 identification.)

15 BY MS. PARKER:

16 Q Let me show you then what we've
17 marked as Exhibit 4 and ask you to take a
18 look at page 171, under the title changes in
19 the style of cigarette advertising, there's a
20 citation to Mr. Calfee's work, correct?

21 A Correct. I think that it's
22 referring to a description that he had in

1 probably a longer article. Do you know what
2 the 19 -- is the 1985 article this one that
3 you've given me?

4 Q There is a different title listed
5 there.

6 A Okay, then.

7 Q Would you agree that Mr. Calfee's
8 work has been cited by the Surgeon General in
9 the 1994 Surgeon General's Report; that's
10 correct, isn't it?

11 A That's correct.

12 Q Mr. Calfee also worked in the
13 Bureau of Consumer Protection; is that
14 correct?

15 A No.

16 Q Where did he work?

17 A He worked in the Bureau of
18 Economics. Bureau of Economics has two parts
19 to it, the one part that deals with the
20 Bureau of Consumer Protection and one part
21 that deals with the Bureau of Competition.

22 So, his part of the Bureau of

1 Economics did their work in the Bureau of
2 Consumer Protection, but they were not a
3 member of that Bureau.

4 Q He worked on tobacco issues,
5 correct?

6 A Among others, he also worked on
7 children's advertising.

8 Q What was his role on the tobacco
9 issues?

10 A Oh, God, let's see. I'm trying to
11 remember whether, what his role was.

12 I know that by the time I became
13 involved in Barclay, there was no economist,
14 so I couldn't tell you exactly what matters I
15 did or didn't work with John on on tobacco.
16 If you want to refresh my recollection, you
17 can, but.

18 Q You don't know what his work was
19 generally with respect to tobacco issues?

20 A Oh, I know about the things he
21 published, in general, but what matters I
22 might have worked with him on on tobacco, I

1 did a lot of work.

2 Q Mr. Calfee was very knowledgeable
3 about the FTC involvement in tobacco issues,
4 correct?

5 MR. PATRICK: I'm going to object
6 to the question, but you can answer it.

7 THE WITNESS: Repeat it again,
8 please.

9 BY MS. PARKER:

10 Q Mr. Calfee was very knowledgeable
11 about the FTC involvement in tobacco issues,
12 correct?

13 A He had knowledge, I mean there were
14 a lot of people in the Bureau of Economics
15 who worked on tobacco issues. He was not the
16 primary person that I dealt with in my years
17 there.

18 I dealt mainly with Howard Biels
19 and with Joe Mohulland. I did some work with
20 John Calfee on tobacco, but not that much, so
21 I couldn't attest to how knowledgeable he was
22 of commission procedures, okay. Processes.

1 Q Let me refer you to what we have
2 marked as Exhibit 4 that I handed to you.

3 A Okay.

4 Q Which is Mr. Calfee's paper
5 number 3. That report is entitled Cigarette
6 Advertising, Health Regulation and
7 Information Before 1970, correct?

8 A Uh-huh, correct.

9 Q You were involved in helping
10 Mr. Calfee prepare this report, correct?

11 A Yeah. I think it says there at the
12 bottom that I'm not responsible for his
13 errors.

14 A Bureau of Economics report that
15 comes out of the Federal Trade Commission
16 comes from the author and the Bureau of
17 Economics, it isn't a document of the Federal
18 Trade Commission and it doesn't carry the
19 imprimatur of the Commissioners.

20 They would ask for a review of the
21 division that had the substantive
22 responsibility. The division that had

1 substantive responsibility would not
2 necessarily agree with everything in the
3 paper.

4 Q I move to strike that response.
5 Here's what my question is: Were you
6 involved in helping Mr. Calfee prepare this
7 report that's been marked as Exhibit 3?

8 A Prepare?

9 Q Yes.

10 A No, I only reviewed it.

11 Q You reviewed the paper before it
12 was finalized?

13 A Well, I can only tell you that my
14 name is here as a reviewer, so I must have
15 reviewed it, but that the preparation would
16 have occurred exclusively in the Bureau of
17 Economics.

18 Q In fact, there on the first page,
19 he thanks especially Judy Wilkenfeld.

20 A He certainly would, wouldn't he.

21 Q He used that word especially,
22 didn't he?

1 A Yes, he did, and by that, that was
2 John's sense of humor.

3 Q He thanked you for your helpful
4 comments, in his words, correct, the helpful
5 comments?

6 A Right, that doesn't mean he
7 actually accepted my advice on my helpful
8 comments.

9 Q Well, I move to strike that
10 response. My question is: He thanked you
11 for your helpful comments, correct?

12 A He thanked me, correct.

13 MR. PATRICK: Object. The document
14 speaks for itself.

15 BY MS. PARKER:

16 Q Did you review the draft of this
17 paper carefully before it was finalized?

18 A Well, the date on it is 1985, which
19 was 15 years ago. From the way my name is
20 listed in the reference here, it would
21 indicate that in the normal course of
22 business, I would have reviewed the draft

1 carefully.

2 I don't have a lot of memory.
3 There were a lot of, there were a lot of
4 things coming out of the Bureau of Economics
5 in those days, but I'm sure that I did review
6 it. I'm also equally sure that I had
7 criticisms that were not incorporated.

8 Q How do you know that?

9 A Because there wasn't anything that
10 came out of the Bureau of Economics in those
11 days that -- now there were things on tobacco
12 that came out of the Bureau of Economics in
13 those days that reflected a balanced view of
14 the evidence.

15 Q What's the basis for that
16 statement?

17 A Work that I did at that time and my
18 memories of the discussions and debates we
19 had.

20 Q Mr. Calfee's report contains a
21 historical review of the FTC action in
22 connection with Reynolds and the other, these

1 other competitors in the tobacco industry; is
2 that correct?

3 A If I remember this one correctly,
4 it's a historical review, along with his
5 analysis of the period of the health
6 marketing and the tar, nicotine advertising
7 and his conclusions about that.

8 Q So you agree it contains a
9 historical review of the FTC action, correct?

10 A Historical. He incorporates within
11 here some of the historical events of FTC's
12 work on tar and nicotine.

13 Q Those historical events are
14 factually accurate, correct?

15 A I couldn't possibly comment on that
16 without reading it and going back and
17 checking evidence. I mean it's been 15 years
18 since I've seen this.

19 Q You just don't know sitting here
20 today whether it was accurate or not?

21 A Correct.

22 Q Did the FTC ever issue a statement

1 that Mr. Calfee's report was inaccurate?

2 A No.

3 Q Did the FTC ever issue a statement
4 that contained any type of criticisms of
5 Mr. Calfee's report?

6 A No.

7 Q Well if you had criticisms of his
8 report, why didn't you issue a press release
9 or let somebody know?

10 A That's not the way the Federal
11 Trade Commission works and certainly it's not
12 the way a staff attorney at a Government
13 agency work. We represent our client,
14 period.

15 Q Who is your client?

16 A As a Government attorney, the U.S.
17 Government, the American people, the Federal
18 Trade Commission.

19 Q What person did you report to as
20 your client at the FTC?

21 A Oh, God, that's a tough question.
22 Who was my client. Well, the five

1 Commissioners would be the ultimate client.
2 The bureau director, the Bureau of Consumer
3 Protection would be my superior, but the
4 views that we would represent would be those,
5 unless, if you notice here there's this
6 statement here, the views expressed here are
7 the author's and not necessarily those of the
8 Federal Trade Commission or other members of
9 the FTC staff.

10 That's a classic statement that has
11 to be made because those views which are
12 expressed in this type of writing are not
13 intended to reflect the commission's views or
14 anybody else at the commission.

15 Q I move to strike the response. My
16 question is: Who was your client, what
17 person did you report to as your client at
18 the FTC?

19 A I answered that, which was that the
20 client was the five Commissioners and that I
21 reported to the bureau director who was in
22 charge of my area.

1 Q Now I believe we've already
2 established, you were not at the FTC
3 before 1980, correct?

4 A Correct.

5 Q Mr. Calfee was at the FTC prior
6 to 1980, correct?

7 A I don't know.

8 Q Well to the best of your knowledge,
9 he was there?

10 A He was there -- we worked on a case
11 in 1980 together. So I know he was there
12 in 1980, but I don't know when he began.

13 Q So you have no personal firsthand
14 knowledge about why the FTC did or did not
15 take any action before you got there in 1980,
16 correct?

17 MR. PATRICK: I'm sorry, I'm going
18 to object.

19 BY MS. PARKER:

20 Q Do you have any personal firsthand
21 knowledge about what happened before you got
22 there?

1 A I have no personal firsthand
2 knowledge. I have the institutional
3 knowledge that comes with the agency.

4 Q Would you agree that Mr. Calfee's
5 report that's been marked as Exhibit 3 is a
6 well-done report?

7 MR. PATRICK: I'm going to object.
8 Actually, pursuant to the local rules, to the
9 extent that a document, a question that
10 pertains to a document has not been tendered
11 to the witness more than two business days
12 prior to the deposition, the deponent has the
13 ability under the rules to review the
14 document prior to answering any questions and
15 actually discussing the document with counsel
16 for plaintiff.

17 So, if the witness wants to review
18 the document in order to answer any further
19 questions, I would request that she be
20 allowed to review the document and discuss
21 whatever questions that may arise with me.

22 THE WITNESS: Yeah.

1 BY MS. PARKER:

2 Q You can't answer my question?

3 A No, I mean this document, I have,
4 you know, I remember reviewing it in '85. I
5 might have looked at it once or twice since
6 then, but I really have not looked at it in a
7 long time.

8 Q Did you know back in 1985 that you
9 had criticisms of the report or did your
10 criticisms of the report arise after the
11 paper was finalized?

12 A I knew I had problems with the
13 report as I reviewed it.

14 Q Why didn't you recommend that the
15 errors be changed before the paper comes out
16 with your name on the front page?

17 A I did. All of our comments would
18 always be passed. Again, I have to speak
19 about things from a memory that's 15 years
20 ago and I can only tell you how we did
21 things, but we would, I and others and since
22 my name is the only one on here, I may have

1 been the only one who would have reviewed
2 this one, but we would have passed our
3 criticisms on to the Bureau of Economics and
4 they may or may not have been taken.

5 In many cases, they weren't. It
6 was true of this document and many, many
7 others that came out of the Bureau of
8 Economics.

9 Q I'm sorry. Did you tell
10 Mr. Calfee, look, I disagree with your paper
11 here and don't put my name on the front and
12 don't thank me for my helpful comments?

13 A First, he didn't ask my opinion
14 about whether I wanted my name on the first
15 page; and second, I would have never told him
16 that. We try to be collegial and he would
17 have had to have indicated that the other
18 people who are listed here, I don't know who
19 Nancy Colemike and Sandy Tubbs and Brenda I
20 presume might be a representative, but
21 Pauline Ippilato and Allison Mason are Bureau
22 of Economics people. I seem to be the only

1 person from the division of advertising
2 practices. He would have to indicate in some
3 way or another that someone from the division
4 had looked at it, at least.

5 MS. PARKER: Let's take a break for
6 the court reporter, please.

7 (Recess)

8 (Wilkenfeld Deposition Exhibit
9 No. 5 was marked for
10 identification.)

11 MS. PARKER: Back on the record.
12 Ms. Wilkenfeld, I've handed you what we've
13 marked as Exhibit 5. Do you have that in
14 front of you?

15 A Yes.

16 Q Now, you know Lee Peeler, correct?

17 A I do.

18 Q He worked as the Associate Director
19 of the Division of Advertising Practices at
20 the FTC?

21 A He was my direct superior.

22 Q He was your boss?

1 A When I was at the FTC.
2 Q In 1994 the FTC made a presentation
3 at a conference conducted by the National
4 Cancer Institute, correct?
5 A Yes.
6 Q That presentation was made by
7 Mr. Peeler?
8 A Correct.
9 Q What we've marked as Exhibit 5 is a
10 copy of his remarks made at that conference?
11 A Correct.
12 Q Now, you played a large role in
13 that conference, didn't you?
14 A But not representing the FTC.
15 Q You played a large role in the
16 conference, correct?
17 A I was consulted during the
18 preparation of the conference. I was not one
19 of the members of the board or the reviewers
20 and I made no presentation at the conference.
21 In the middle of the -- between the
22 preparation and the occurrence I left FTC and

1 went to FDA. So that I attended the
2 conference more as an observer from FDA.

3 Q When did you leave? What month did
4 you leave FTC?

5 A Exact month. I think I started at
6 FDA in September. Oh, wait a minute. I know
7 exactly when it is, but I can't give you the
8 date. But if you have a Jewish calendar, it
9 was between Rosh Hashana and Yom Kippur in
10 September '94.

11 Q So it was in September of '94?

12 A Well, that was in October.
13 Whenever that was. I can go back and look at
14 it that way.

15 Q Now, Mr. Peeler's remarks were made
16 on behalf of the Bureau of Consumer
17 Protection, correct?

18 A Correct.

19 Q Were a part of that Bureau of
20 Consumer Protection until you left in
21 September or October?

22 A September, right. Probably

1 September.

2 Q On the title page here of Exhibit 5
3 it says, "These remarks are the views of the
4 staff of the Bureau of Consumer Protection."
5 Do you see that?

6 A Correct.

7 Q That would include you up until the
8 time you left?

9 A No. This was in December.

10 Q I said up until the time you left.

11 A Yeah, but this wasn't written when
12 I was there.

13 Q Were you involved at all in
14 drafting this?

15 A No, I had nothing to do with this.

16 Q Nothing at all?

17 A Nothing whatsoever.

18 Q Have you reviewed these remarks
19 previously prior to today?

20 A I think the last time I looked at
21 these remarks was in, let's see, when the
22 Food & Drug Administration prepared comments

1 on the FTC method, I looked at Lee's comments
2 then. That would have been -- I can check
3 my -- the thing y'all gave me.

4 MR. PATRICK: Do you need your CV?

5 THE WITNESS: This. Let me see
6 this. I think this has the date.

7 Did I give you all the date of
8 this? Probably it's -- it's 1998 at some
9 date. I tell you I could be -- I gave you a
10 date when I went back and looked at it, but
11 I'd have to find out what the date was. But
12 it was in 1998 when the -- I think it
13 was 1998 when the FDA commented on the
14 FTC's --

15 Q Do you have any reason to dispute
16 that Mr. Peeler's remarks that have been
17 marked as Exhibit 5 do not accurately reflect
18 the views of the Bureau of Consumer
19 Protection back in 1994?

20 A Do not represent the -- oh, the --

21 Q Do you have any reason to dispute
22 that this is --

1 A No, I -- I am sure that he
2 represented the views of the Bureau of
3 Consumer Protection.

4 (Wilkenfeld Deposition Exhibit
5 No. 6 was marked for
6 identification.)

7 BY MR. PATRICK:

8 Q Let me show you now what we've
9 marked as Exhibit 6. Exhibit 6 is the FTC
10 determination issued in 1983 with respect to
11 Barclay cigarettes; is that correct?

12 A Correct.

13 Q It was published in the Federal
14 Register, correct?

15 A Correct.

16 Q This determination was the subject
17 of the FTC's lawsuit against Barclay?

18 A Against Brown & Williamson.

19 Q Against Brown & Williamson, right.

20 If you look at the document on page
21 one, it lists you as the contact person for
22 the FTC, correct?

1 A Correct.

2 Q So I assume you were involved in
3 the process leading up to the creation of
4 this determination; is that correct?

5 A The process that led up to the
6 determination was begun before I became -- I
7 became program advisor for cigarette -- I
8 mean for tobacco -- cigarettes and tobacco
9 in 1983 and so the first matter that I took
10 on was Barclay.

11 By the time I became program
12 advisor for tobacco matters it had already
13 gone through the commission review. There
14 was a whole long process led up to the
15 commission's determination. There was a
16 selection of experts.

17 There was their determination,
18 there was the commission's determination,
19 there was an attempt to publish that
20 determination, there was a lawsuit filed by
21 Brown & Williamson in the Western District of
22 Kentucky and then there was an appeal.

1 I came in after all of that had
2 occurred. So I came in at the point in time,
3 I think it was between the District Court
4 case and the Sixth Circuit's overturning of
5 the District Court decision in which we were
6 going to try again to reissue the statement
7 that the commission had prepared earlier.

8 Q So starting at that point in
9 time you became involved with this issue?

10 A Yeah.

11 Q Well, did you, in fact, help
12 prepare this determination that has your name
13 on it?

14 A You mean this Federal Trade
15 Commission --

16 Q Yes.

17 A Yes. I mean this Federal Register.

18 Q You did?

19 A Yeah.

20 Q Does this determination accurately
21 reflect the belief of the FTC at that time?

22 A Yes.

1 Q The statements contained in it were
2 true when they were written, correct?

3 A The represent the findings of the
4 Federal Trade Commission. They accurately
5 reflect the findings of the Federal Trade
6 Commission and what the Federal Trade
7 Commission believed to be true at that time.
8 (Wilkenfeld Deposition Exhibit
9 No. 7 was marked for
10 identification.)

11 BY MS. PARKER:

12 Q Let me show you now what we've
13 marked as Exhibit 7, and those are the FDA
14 comments to the FTC proposal to change the
15 FTC method?

16 A Right.

17 Q Is that correct?

18 A Correct.

19 Q You've seen that document before?

20 A Indeed.

21 Q In fact, your expert disclosure in
22 this case says you're relying on that

1 document here, correct?
2 A Correct.
3 Q You helped draft that document,
4 didn't you?
5 A Yes.
6 Q Would you describe your role as
7 substantial?
8 A I'm the primary author.
9 Q Primary author.
10 Now, there are numerous statements
11 in this document that relate to the FTC's
12 involvement in the testing of the tar and
13 nicotine levels for cigarettes, correct?
14 A Correct.
15 Q Were you the one who provided the
16 information on the FTC that's contained in
17 those comments?
18 A Could you show me which comments
19 and --
20 Q I'm just asking generally about the
21 document because there are a number of
22 comments in there about the FTC's

1 involvement, correct?

2 A Well, the only thing I can say is
3 that -- that when preparing this document,
4 I -- I referred to primary sources, which --

5 Q Who were your primary sources?

6 A They're in the footnotes.

7 Q Then you were the one who was the
8 primary author to write that up?

9 A Yes.

10 Q So would you consider that
11 document --

12 A The document, though, reflects
13 the -- again, I want to reiterate that when a
14 government attorney produces a document, it
15 reflects the opinions of their agencies and
16 not of themselves, so that what I wrote and
17 how it eventually appeared may not be be
18 exactly the same.

19 Q I'm sorry. Go ahead.

20 A But it -- it would reflect my work
21 product.

22 Q Well, you wouldn't have written

1 anything that you knew was false, would you?

2 A No, not false.

3 Q Wouldn't have written anything that
4 you knew was misleading, would you?

5 A Not misleading. But opinions that
6 are sometimes represented are not necessarily
7 the opinions of the author.

8 Q Would you consider this document
9 authoritative on issues relating to the FTC
10 method? I mean you're relying on it in this
11 case; is that correct?

12 A Authoritative?

13 Q Yes.

14 A It's a -- it -- it is what it is,
15 which is the -- the views of the Food & Drug
16 Administration on the Federal Register notice
17 published by the FTC about its desire to
18 modify its procedure at that time.

19 Q Would you consider that
20 authoritative?

21 A I don't know what authoritative
22 means in this context?

1 Q You don't have any understanding of
2 the word "authoritative"?

3 A Well, what do you mean by
4 authoritative?

5 Q Let me ask you this: You're a
6 lawyer, right?

7 A Yes.

8 Q As a lawyer, you understand you're
9 testifying here as an expert witness, right?

10 A On very limited things, yeah.

11 Q You've given us a disclosure in
12 this case saying that you're relying on
13 certain documents as the basis of your
14 opinion, right?

15 A Correct.

16 Q This is one of those documents you
17 say you relied on?

18 A This is one those documents right.
19 This -- this represents a process of -- this
20 represents how the regulatory process works.

21 Q Wouldn't rely on something you
22 thought was not authoritative, would you?

1 MR. PATRICK: I don't know want to
2 get into the process of a speaking objection.
3 I certainly wouldn't do that. But I think if
4 you're using the word "authoritative" and how
5 it's defined for purposes of the Federal
6 Rules of Evidence, then I think maybe that
7 may give you some background.

8 THE WITNESS: I see. The -- the
9 problem is when I think of authoritative, for
10 instance, if -- if I cited -- if I cited to
11 someone -- somebody's study as authoritative
12 and this document stands for what it is,
13 which is a -- which is the opinion of the --
14 of the Food & Drug Administration on this, so
15 if that's authoritative, yes, with that
16 caveat.

17 BY MS. PARKER:

18 Q Well, do you agree with the
19 statements in the document there that relate
20 to the FTC's involvement in the testing for
21 tar and nicotine levels of cigarettes?

22 A I would rather reference specific

1 statements, but nothing in here should be
2 false.

3 Q In addition to the FTC's
4 involvement, another topic that's addressed
5 in that exhibit is the FDA's position on the
6 potential change to the FTC method; is that
7 correct?

8 A Correct.

9 Q Are those statements relating to
10 the FDA's position on the potential change to
11 the FTC method an accurate representation of
12 the FDA's position on that issue?

13 A At that time, absolutely.

14 Q Those statements were truthful
15 again, at the time they were written?

16 A Absolutely.

17 Q Again, you would not have submitted
18 something to the FTC that was untrue,
19 correct?

20 A Correct.

21 Q Are they still true today?

22 A One of the things that the

1 recommendation -- our recommendation was, is
2 that the FTC not go forward with its
3 modification at that time and instead do some
4 more work before determining how it was going
5 to proceed.

6 As a result of that comment, many,
7 many others that they got similar to that,
8 the FTC asked HHS to do a review, which is
9 now in the process of happening. FDA, NCI
10 and CDC -- do you need -- do you want me to
11 say those out? I mean Food & Drug
12 Administration, National Cancer Institute
13 and -- okay -- and the Center for Disease
14 Control and Prevention, are conducting that
15 review now.

16 I'm not a member of the government
17 any longer. I don't know what the results of
18 that review would be. When that review comes
19 out, that will be more authoritative.

20 MS. PARKER: Let me show you now
21 what we've marked as Exhibit 8. Hand that to
22 the witness please.

1 (Wilkenfeld Deposition Exhibit
2 No. 8 was marked for
3 identification.)

4 BY MS. PARKER:

5 Q Exhibit 8 is an article from the
6 Lancet, correct?

7 A Uh-huh, right.

8 Q That is a summary of what's
9 referred to as a Scarborough conference; is
10 that correct?

11 A Correct.

12 Q It's dated 1985?

13 A Uh-huh.

14 Q You're relying on this document in
15 the Little case?

16 A Historically, yes.

17 Q You are a participant in that
18 conference; is that correct?

19 A Correct.

20 Q Did you help draft this article?

21 A No.

22 Q Have you seen this article before

1 today obviously?

2 A Yes.

3 Q Are you familiar with it?

4 A Yes.

5 Q Are the statements in the article
6 true at the time of the conference?

7 A The statements represent the
8 opinions of the people who came to that
9 conference at that time. It's an accurate
10 reflection of -- of their opinions.

11 Q Including your opinions?

12 A I came to this conference -- the
13 conference itself actually was in 1983,
14 directly after the Barclay litigation, and my
15 role was to describe what happened in the
16 Barclay case and what -- what the Federal
17 Trade Commission was going to be doing in the
18 future about the testing methodology.

19 Q Well, my question is: Does this
20 article that we've marked as an exhibit that
21 you have in front of you does that accurately
22 reflect opinions that you've set forth at

1 that conference?

2 A It -- yes, but not all of the
3 opinions in here are mine. There are --
4 there are other people's opinions.

5 Q Would you consider this exhibit
6 authoritative on the issues relating to lower
7 tar cigarettes?

8 A I think it's authoritative as
9 representing the views of those people at
10 that time and most of them were recognized
11 authorities in the field.

12 Q Now, in addition to this Lancet
13 article, you are also relying, according to
14 your disclosure, on the Monograph 7, correct?

15 A Yeah, I'm not an author of anything
16 in there.

17 Q Find the Monograph 7 to be
18 authoritative on the issues relating to the
19 FTC method; is that correct?

20 A Yes, I think it represents the
21 evidence at that time.

22 Q You're familiar with Sir Richard

1 Doll from England, aren't you?
2 A Yeah.
3 Q You know that name?
4 A I know the name.
5 Q Have you ever met him?
6 A If I met Sir Richard Doll? I'm
7 trying to remember whether he was at any of
8 the conferences I -- if I did, it was a
9 fleeting meeting.
10 Q Sir Richard Doll has conducted
11 extensive research into smoking and health
12 issues, correct?
13 A Yes, I've used his work.
14 Q You've used his work?
15 A Uh-huh.
16 Q Would you consider him
17 authoritative on issues of smoking and
18 health?
19 A He is one of the authorities that
20 is often referred to.
21 Q Do you know who Dr. Gio Gory is?
22 A I certainly do.

1 Q You have met him?

2 A I just saw him last week.

3 Q You're aware that he was head of
4 the tobacco working group for a period of
5 time at the National Cancer Institute?

6 A Correct.

7 Q So he was a government official
8 like you were?

9 A Well, I don't like the like I was,
10 but he was a government official.

11 Q Well, you were also a government
12 staff person?

13 A He wasn't a lawyer and the rules of
14 government employment are different for
15 different types of -- categories of people.

16 Q He's a medical doctor?

17 A Right, and he had much more -- a
18 lawyer, as I say, has to represent the views
19 of -- of the agency that they work for. A
20 scientist or medical researcher can develop
21 their own opinions and publish their own
22 thoughts. They have more leeway. That's my

1 understanding.

2 Q I'm going to move to strike that
3 response. Dr. Gori is a well respected
4 scientist, isn't he?

5 A I guess I'd have to disagree with
6 that.

7 Q Do you not think he's a well
8 respected scientist?

9 A I think it is spotty. I think it
10 has both -- he has both done some good work
11 and done some questionable work.

12 Q Well, he has done a substantial
13 amount of research into smoking and health
14 issues, wouldn't you agree?

15 A Correct.

16 Q Would you consider him
17 authoritative on smoking and health issues?

18 A No.

19 Q Are you familiar with Dr. William
20 Ferrone?

21 A Only in passing.

22 Q Have you ever met him?

1 A No. I don't think so at least.

2 Q Do you know that he was a scientist
3 who was employed by Philip Morris?

4 A I know he was employed by one of
5 the tobacco companies. The -- the Food &
6 Drug Administration had a two-part
7 investigation and his participation or use
8 would have been on the assertion of
9 jurisdiction side and I worked on the
10 regulatory side. So I don't have as much
11 firsthand information on what went on in that
12 side of the investigation.

13 Q Well, my only question to you is do
14 you agree that he was a scientist at Philip
15 Morris?

16 A I don't -- you know --

17 Q Do you agree he was a scientist at
18 one of the tobacco companies?

19 A Yes. There we go.

20 Q Were you aware that he was listed
21 as an expert witness by the plaintiff in this
22 case?

1 A No.
2 Q Would you consider him an expert on
3 cigarette design?
4 A You'd only be asking my opinion
5 based on the fact that I don't know his work
6 or him.
7 Q Are you familiar with Dr. Ernst
8 Wynder?
9 A Yes.
10 Q Do you consider him authoritative
11 on smoking and health issues?
12 A Absoluetely.
13 Q Are you familiar with Dr. Lynn
14 Kazlowsky?
15 A Yes.
16 Q You previously used him as an
17 expert witness, correct?
18 A Yes.
19 Q That was when you worked at the
20 FTC?
21 A Correct.
22 Q You would consider him to be a

1 topnotch scientist, correct?
2 A In his field, yes.
3 Q Would you consider him to be
4 authoritative on smoking and health issues?
5 A Lynn's area is -- smoking and
6 health is very broad, so I guess yes, but --
7 Q Are you familiar with Dr. Dietrick
8 Hoffman?
9 A Yes.
10 Q He participated in this National
11 Cancer Institute Monograph 7 conference back
12 in 1994, correct?
13 A I think so. Dietrick is -- yeah.
14 Q That's a conference where you were
15 also a participant?
16 A I was not a participant.
17 Q Attendant.
18 A Attendant.
19 Q Where you also attended?
20 A I was an attendant, yes.
21 Q Dr. Hoffman is a well-respected
22 scientist, correct?

1 A Yes.
2 Q He has done intensive research into
3 smoking and health issues, correct?
4 A Absolutely.
5 Q Did you say absolutely?
6 A Absolutely, yes.
7 Q Would you consider him
8 authoritative on smoking and health issues?
9 A Yes.
10 Q Now, while you were at the FTC you
11 dealt with lawyers representing various
12 tobacco companies; is that correct?
13 A Uh-huh.
14 Q Did you work with John Rupp?
15 A Yes.
16 Q Would you agree with me that he is
17 an honorable, cooperative lawyer?
18 A Would I agree with you that he's an
19 honorable and cooperative lawyer? His -- oh,
20 god, what a question. Would I believe he is
21 an honor -- I would say that most of the time
22 John dealt with Federal Trade Commission in a

1 very honorable way. I would not say that he
2 dealt with us honorably all the time, but
3 that most of the time he did.

4 Q Mr. Rupp never misrepresented
5 anything to you, did he?

6 A I would think that Mr. Rupp
7 misrepresented quite a few things to me over
8 the years, yeah.

9 Q What about Judy Oldham? Do you
10 consider her an honorable lawyer?

11 A Yes.

12 Q She never misrepresented anything
13 to you, did she?

14 A No.

15 Q She's a lawyer for my client, R.J.
16 Reynolds Tobacco Company, correct?

17 What about Jim Riel? Did you know Jim
18 Riel?

19 A I did.

20 Q Would you consider him an honorable
21 lawyer?

22 A I would. Yes.

1 Q Mr. Riel never misrepresented
2 anything to you?

3 A Misrepresented? Probably not. I
4 mean there was -- I remember one -- one
5 instance in which they may have been less
6 than forthcoming, but --

7 Q But did he misrepresent anything to
8 you?

9 A No, I considered his representation
10 to be very honorable.

11 Q He's also a lawyer for R.J.
12 Reynolds Tobacco Company?

13 A Correct.

14 Q What about Dan O'Neill?

15 A Dan O'Neill. American Tobacco?

16 Q Do you remember him?

17 A At American Tobacco.

18 Q Do you remember him?

19 A Oh, yeah. Not as well as the
20 others. I mean the others I had experiences
21 with over the entire period of time. I think
22 Dan I only ran into a couple of times.

1 Q Would you consider Mr. O'Neill an
2 honorable lawyer?
3 A Didn't deal with him enough.
4 Q Did Mr. O'Neill ever misrepresent
5 anything to you?
6 A I have no knowledge.
7 Q Pardon?
8 A I have no knowledge.
9 Q Sitting here today do you know --
10 A Well, I have no knowledge he did,
11 that's right.
12 Q Now, is the committee on tobacco
13 product change that you're a director of, is
14 that a 501(c)(3) organization?
15 A It's a nothing.
16 Q It's just a committee?
17 A It has no -- it has no finances.
18 We've met, I think, four or five times. We
19 are trying to educate ourselves on the issues
20 of new products and --
21 Q Who's on the board? Do you have a
22 board?

1 A There is no board.

2 Q Who's on the committee?

3 A I probably can't rattle off
4 everybody. John Pinney, Slade, Dietrich
5 Hoffman, David Sweanor, Matt Myers, John
6 Cummings, Jack Henningfield, Neal Benowitz,
7 although he hasn't attended any meetings yet,
8 Ken Warner, and he's only been on the phone.
9 What's his name from Canada? LabStat. The
10 director of LabStat whose name will come to
11 me in a minute. Ellen Gritz.

12 She has a young man who is working
13 with him whose name is something like
14 Sensorpenny, but I'd have to get you the
15 exact spelling. Sometimes Murray Kaiserman
16 comes. It's very loose. We don't have any
17 rules for membership other than the desire to
18 work on this issue and to contribute.

19 Q How are members chosen?

20 A They're not really chosen. They
21 choose themselves. We've -- we've let --
22 we've let the community know that this is an

1 area that the public health community has
2 been woefully underrepresented.

3 Q So could I become a member?

4 A No.

5 Q Why not?

6 A Because it's only -- okay. Then
7 there are some rules then I guess. One of
8 the rules is that we don't have people in the
9 tobacco industry. I mean we -- including --
10 we want -- we want to be on one side, tobacco
11 industry on the other.

12 Q So it's one sided?

13 A One sided? No, we have actually a
14 very diverse group of opinions. We have
15 someone who's there -- oh, Scott Ballin, who
16 had disclosed to us that he represents Star
17 Tobacco. So he is -- he has a sort of -- of
18 role as opposed to a total role. Who else?
19 I can get you a complete list if you would
20 like me to.

21 Q Now, tell me how the committee, the
22 Committee on Tobacco Product Change, relates

1 to the Campaign for Tobacco-Free Kids, is
2 that a committee of the campaign or are they
3 totally separate?

4 A No. When the committee was formed,
5 we needed a place to sit and we sit in the --
6 in the campaign and that's it. They -- they
7 provide us with a minimum of administrative
8 support.

9 Q You mentioned Scott Ballin's name.
10 Now, he was previously a spokesperson for the
11 American Heart Association?

12 A Right. He isn't any more.

13 Q He isn't any more?

14 A Uh-uh.

15 Q Were you about to say something
16 else?

17 A Uh-uh, uh-uh.

18 Q So your committee does not allow
19 the tobacco industry to be represented; is
20 that correct?

21 A Correct.

22 Q Are your meetings open to the

1 public?

2 A No.

3 Q Do you keep notes of your meetings?

4 A Yes.

5 Q Are you the person who keeps those
6 notes?

7 A Am I the person who keeps notes. I
8 have notes.

9 Q Are those your own notes?

10 A They represent the notes of whoever
11 was taking notes at that meeting. Sometimes
12 it was me, sometimes it was Joe Gitchell,
13 sometimes -- this last time it was a
14 secretary.

15 Q You're the person, though, who's
16 the custodian of all of those notes?

17 A I'm the chair of a loose
18 confederation of people.

19 Q Let me go back to the very first
20 exhibit we marked today, which is your CV,
21 and just ask you if that is current.

22 A No, no, it is --

1 Q Do you have a more current one?
2 A No.
3 Q What needs to be added to that?
4 A The fact that I'm now a full-time
5 consultant with the Campaign for Tobacco-Free
6 Kids directing their WHO framework convention
7 alliance and I have another publication and
8 another one in press.
9 Q Is that the editorial?
10 A Uh-huh.
11 Q Which is the one in press?
12 A I was asked by WHO to prepare a
13 comment on -- Mitch Zeller gave a speech at
14 New Delhi and I was asked to write a comment
15 for it for one of their forthcoming
16 publications and I hope when I go to Geneva
17 at the end of the month, I'll find out what
18 publication I actually wrote for. But I -- I
19 don't -- I have no idea what that one is --
20 when that one is going to appear.
21 Q Are you a smoker?
22 A I'm an ex-smoker.

1 Q When did you smoke?

2 A I smoked off and on for six, eight,
3 nine years.

4 Q What period of time?

5 A I quit July 26th, 1968.

6 Q You said you smoked off and on?

7 A Well, I quit for a three-year
8 period in the middle, so I smoked, quit and
9 smoked.

10 Q So you were able to quit smoking on
11 two different occasions; is that correct?

12 A Uh-huh. With great difficulty.

13 Q But you were able to quit?

14 A With great difficulty. Yeah, I'm
15 not smoking now. I became very sick and had
16 to quit.

17 Q Have you ever testified as an
18 expert witness before?

19 A No.

20 Q Have you ever served as a
21 consultant to a law firm before?

22 A No.

1 Q Have you ever been found by any
2 court to be qualified on any issue as an
3 expert?

4 A Well, I've never tried.

5 Q So you've never been found to be
6 qualified?

7 A Right, no, I've never been a
8 witness at -- in a trial.

9 Q You mentioned earlier that you're
10 charging the plaintiff's lawyers \$400 an hour
11 for your work. Is that your standard rate
12 that you charge them for all of their work or
13 do you charge them something different for
14 trial versus preparation work?

15 A No, that was --

16 Q Everything?

17 A Uh-huh.

18 Q It's approximately the same rate
19 that I did for Smith-Kline.

20 Q Can you tell me first just,
21 generally, what have you done on this case?

22 A I spent some time describing the

1 FTC -- the process of, you know, the FTC
2 method, how the commission worked, you know,
3 what happened. Just the history of --

4 Q Described that to who?

5 A To -- to the lawyers at Ness
6 Motley. I also, I think, described the
7 Barclay case and the 10 to 1 Carlton case and
8 I think that's it.

9 Q How many meetings have you had with
10 the plaintiff's lawyers?

11 A You mean face-to-face?

12 Q I'll first ask face-to-face.

13 A One.

14 Q Are the rest of your communications
15 over the phone?

16 A Phone calls.

17 Q How many telephone calls have you
18 had with them?

19 A Well, when I went back and looked,
20 up through January, I had all together,
21 including a day and-a-half down in
22 Charleston, was 29 hours. I think there's

1 probably been another 10 since then. So
2 considering that a lot of that was time in
3 which I did some preparation, phone calls, I
4 don't know, five. Five or six. I mean
5 sometimes there were phone calls going back
6 and forth just trying to set up times and
7 things.

8 Q Spent a day and-a-half working with
9 them in Charleston; is that correct?

10 A Came in one night and spent the
11 whole next day and then left the next
12 morning.

13 Q About when was that? Was it this
14 year? Was it the year 2000?

15 A Was it the year 2000? No, it
16 was -- I think it was October 5th and 6th.

17 Q Of 1999?

18 A Uh-huh.

19 (Wilkenfeld Deposition Exhibit
20 No. 9 was marked for
21 identification.)

22 BY MS. PARKER:

1 Q Let me show you now what we're
2 marking as Exhibit 9 and one of these copies
3 is for Mr. Patrick. That's a copy of the
4 notice that you were served with for your
5 deposition today; is that correct?
6 A Uh-huh.
7 Q The notice asked you to bring
8 documents with you, correct?
9 A Uh-huh.
10 Q Those are the two stacks?
11 A Yeah.
12 Q Have you fully complied with the
13 subpoena?
14 A Got number one, number two, number
15 three, four, yeah.
16 Q Everything is there?
17 A Uh-huh.
18 Q We will have the court reporter
19 make a copy of those.
20 A Do you need this? I mean you have
21 a copy of this, right? This is --
22 Q Why don't you just put that in the

1 stack.

2 A Okay.

3 Q So right there on the table in
4 those two stacks are all of the documents
5 that exist in the world that you're relying
6 on; is that correct?

7 A Oh, yeah. No, it said -- it
8 said -- so far, yeah.

9 Q Is that everything?

10 A Yeah.

11 Q I got your list earlier from the
12 plaintiff's lawyers, your disclosure list of
13 documents you're relying on as an expert, and
14 there were no company documents, no tobacco
15 company documents on the list.

16 A Yeah. I've subsequently -- they're
17 in here.

18 Q They're in the two sets?

19 A Yeah, they're -- I think these are
20 the only two I haven't provided you and most
21 of the ones with the little tabs. There's a
22 pile of stuff I got from the FTC, a pile of

1 stuff from Motley that contained company
2 documents and these are some company
3 documents from Stan Glantz' and John Slade's
4 book on the tobacco papers.

5 Q If I heard you correctly, you said
6 that's all you're relying on so far or is
7 that it?

8 A I would only say so far. I mean I
9 haven't -- I don't know what new will come
10 up.

11 Q Is there anything in particular
12 that you know you need to do before you can
13 testify?

14 A No.

15 Q Do you have any work planned that
16 you just haven't been able to finish yet?

17 A No, the things -- for instance, I
18 was at a meeting of the Institute of Medicine
19 and some documents were referenced that I had
20 been unaware of and that's -- that's actually
21 where these two come from. So if documents
22 come my way that I haven't been aware of in

1 the past, I would probably look at them and
2 rely on them. But I'm not -- yeah.
3 Q If you do that, will you let
4 Mr. Patrick know so that he can advise us?
5 A Absolutely.
6 Q I see you have all sorts of
7 different colors on your --
8 A Do they mean anything?
9 Q Do they mean anything?
10 A Do they mean anything? Yeah, but
11 let's see. The paper ones mean more reliance
12 than -- when I went through the first time, I
13 tabbed with the --
14 Q The smaller colored tabs?
15 A The smaller Post-Its and the -- the
16 large papers indicate greater interest on my
17 part.
18 Q How did you get involved in tobacco
19 litigation? Did you call Ness Motley and
20 say --
21 A Oh, you mean this one?
22 Q Yes.

1 A I was just going to say because --
2 and the other one I just happened to be
3 innocently working at the Federal Trade
4 Commission and they asked me to do tobacco.

5 Q How did you get involved? Did you
6 call Ness Motley and say you want to --

7 A No.

8 Q Did they call you?

9 A No. Did they call me? Yes. They
10 had been talkin with -- I know a lot of
11 people in the field and I guess questions
12 must have arisen about the FTC method and
13 they said talk to Wilkenfeld. She knows
14 about the FTC method.

15 Q Who is the they that you are
16 referring to?

17 A Was it David Burns?

18 MR. PATRICK: I believe that's
19 right.

20 THE WITNESS: I think it -- I -- I
21 presume it was David. David Burns is also a
22 member of the committee.

1 BY MS. PARKER:

2 Q Have you ever met with any
3 consultants about how to be a witness?

4 A No.

5 Q At any point in time?

6 A Ever. Not -- no.

7 Q Did you review any documents in
8 connection with your deposition or the
9 opinions that you're going to give in this
10 case other than those two stacks right there?

11 A No.

12 Q Let me make sure I'm correct. The
13 stack that's closest to the court reporter --
14 I'm sorry you're going to need to get back in
15 front of the camera.

16 A Oh.

17 Q You don't need to pick it up.

18 A But I'm not sure. I don't want to
19 make a statement that this is anything --
20 okay. These are -- this whole stack -- this
21 is all probably the Barclay case and these
22 are guides from the Tar Derby days.

1 Q Where did you get those documents?

2 A Federal Trade Commission.

3 Q How did you get them?

4 A Those are all publicly-available
5 materials.

6 Q How did you get them though?

7 A I went --

8 Q I mean did you go to the FTC?

9 A I walked down to the FTC and I said
10 I'd like some publicly-available documents.

11 I was not -- I was hoping to see more things,
12 but the -- the FOIA request from Barclay has
13 not been answered by the Federal Trade
14 Commission and the Federal Trade Commission
15 would not let me even see my files that I had
16 made during that investigation without a FOIA
17 request and without a production pursuant to
18 that. As far as the FTC is concerned, I'm no
19 different than any other citizen.

20 Q So you have one or two FOIA
21 requests outstanding?

22 A I don't --

1 MR. PATRICK: We have a FOIA
2 request.

3 THE WITNESS: Yeah, I don't have
4 any FOIA requests.

5 BY MS. PARKER:

6 Q The second set of documents are
7 documents provided to you by Ness Motley?

8 A No, these are my personal
9 documents. Most of these came from Ness
10 Motley. Some more trial briefs in here.

11 Yeah, I think this pile here is
12 from Ness Motley. These, as I say, I picked
13 up on my own, has to do with -- and these are
14 from Ness Motley.

15 Q What is this stack here?

16 A Oh, when you say rely on, I didn't
17 put in there any of the things that are
18 attached to my statement, so there is not in
19 there -- Scarborough isn't in there, the
20 FDA -- the FDA comment isn't in there and --

21 Q But those are items on your list
22 that you've given to us previously?

1 A Yes.

2 Q Did you review any transcripts of
3 any depositions taken in this case?

4 A No.

5 Q Did you ever discuss this case with
6 Martin Little before he passed away?

7 A No.

8 Q Did you ever discuss this case with
9 his wife, Mrs. Little?

10 A No.

11 Q Have you ever discussed this case
12 or the issues in this case with any of the
13 other plaintiff's experts?

14 A I'm sure I talked with David about
15 what his participation was, but no
16 in-depth --

17 Q Is David, David Burns?

18 A David Burns -- but no in-depth
19 discussion. I spoke with Jack Henningfield
20 at some point, but we didn't get into the
21 issues.

22 Q Did you talk to him about the

1 Little case?

2 A I'm not sure if we talked about the
3 Little case specifically. He had sent me a
4 transcript of one of his court testimonies in
5 a prior case but not in connection with this
6 matter, in connection with something that we
7 were doing in the Committee on Tobacco
8 Product Change.

9 Q Do you recall which case?

10 A No, because, in fact, I didn't read
11 it.

12 Q Have you ever had any discussions
13 with any of Mr. Little's doctors?

14 A No.

15 Q I gather from what you said that
16 you've done no research, no study about what
17 ads, what cigarette ads that Mr. Little
18 either saw or did not see during his
19 lifetime; is that correct?

20 A Correct.

21 Q So you're not here to give
22 testimony about what ads Mr. Little may or

1 may not have seen?

2 A Correct.

3 Q So you're not planning to give any
4 testimony about anything Reynolds or any of
5 Reynolds' competitors did that specifically
6 had an impact on Mr. Little; is that correct?

7 A Correct.

8 Q Do you know what brands Mr. Little
9 smoked?

10 A Other than what's been told to me?
11 I mean I was told he smoked Winston, Barclay
12 and Carlton.

13 Q Do you know when he smoked each one
14 of those brands?

15 A Not with a certainty.

16 Q Your information about what he
17 smoked came from the plaintiff's lawyers; is
18 that correct?

19 A Yes.

20 Q So you don't have any knowledge
21 about Mr. Little's smoking behavior?

22 A Correct.

1 Q Are you aware that Mr. Little was a
2 heavy marijuana smoker?

3 MR. PATRICK: Objection.

4 THE WITNESS: I told you I don't
5 know anything about Mr. Little.

6 BY MS. PARKER:

7 Q Has anybody ever told you that he
8 smoked marijuana?

9 A I was consulting with my lawyer
10 here.

11 MR. PATRICK: If you know or
12 remember.

13 THE WITNESS: Could you repeat the
14 question?

15 BY MS. PARKER:

16 Q Uh-huh. Has anybody ever told you
17 that Mr. Little smoked marijuana?

18 A At any time ever?

19 Q Correct.

20 A It may have been mentioned, but,
21 you know, I was not familiar with Mr. Little
22 or any of his habits.

1 Q So you also don't have any
2 knowledge about Mr. Little's smoking
3 behavior of his marijuana cigarettes?

4 A Yeah. I mean if it existed, I
5 don't have any information about it.

6 Q You're not qualified as an expert
7 with regard to smoking behavior of marijuana
8 cigarettes; is that correct?

9 A That's for sure.

10 Q So as I gather what you're saying,
11 you're really not here to give any testimony
12 at all that relates specifically to
13 Mr. Little; is that correct?

14 A Correct, correct.

15 Q Now, I understand that you worked
16 as a lawyer at the FTC from '80 until '94.
17 Are those the years?

18 A Uh-huh.

19 Q What positions did you hold during
20 that 14-year period?

21 A When I was hired in 1980, I came on
22 as a staff attorney to work on the children's

1 advertising rule making and I actually helped
2 manage its debt.

3 Q That has nothing to do with
4 tobacco?

5 A Had nothing to do with tobacco.
6 Then I was a general attorney in the division
7 of advertising practices and worked on air
8 filter cases, satisfaction guaranteed, the
9 whole panoply of advertising cases that --
10 that the FTC handles.

11 In 1983 I became program director
12 for cigarette advertising and testing I think
13 is what it was called, which meant that in
14 addition to being a staff attorney, I was
15 responsible for the -- the commission's
16 tobacco program.

17 In that capacity I became first
18 primarily responsible for the Barclay matter,
19 which was ongoing, as well as the oversight
20 of the tar and nicotine testing laboratory,
21 the implementation of the comprehensive --
22 Comprehensive Smoking Health Education Act,

1 the Comprehensive Smokeless Tobacco Health
2 Education Act and the rotational warnings
3 that came with that, the R.J. Reynolds'
4 cigarettes and science litigation, several
5 consent orders against smokeless and
6 cigarette companies and my last action was
7 not bringing a case against R.J. Reynolds
8 advertising for Joe Camel.

9 In the middle of that -- I became
10 the assistant director of the division.

11 Q My question was actually related to
12 the positions that you held. So let me go
13 over and ask you again about the positions.

14 A Staff attorney, program advisor,
15 assistant director.

16 Q Now, the period of time that you
17 started working on the tobacco advertising
18 program of the FTC. Was that 1983? Is that
19 what you said?

20 A Yes.

21 Q You worked on that from 1983 until
22 you left in 1984?

1 A Correct.
2 Q Now, is the tobacco advertising?
3 A Oh, I was also a program director
4 at one time for Food & Drug at the same time
5 I did cigarettes. Brief period.
6 Q The tobacco advertising program
7 that you were director or assistant director
8 of, that's under the direction of the Bureau
9 of Consumer Protection?
10 A Correct.
11 Q Is that correct?
12 A Correct.
13 Q So the Bureau of Consumer
14 Protection is, in turn, a division of the
15 FTC?
16 A The FTC has three bureaus.
17 Q Is that one of them?
18 A That's one of them.
19 Q What are the other bureaus?
20 A Competition, which does antitrust,
21 and economics.
22 Q You never worked for those other

1 two bureaus?

2 A No.

3 Q So you never worked for the Bureau
4 of Economics?

5 A No, I think you have to be an
6 economist.

7 Q You never worked for the Bureau of
8 Competition?

9 A No.

10 Q So you never had anything to do
11 with the enforcement of antitrust laws?

12 A No. I mean we talked with on
13 another on cases that overlapped, but I had
14 nothing to do with it. No.

15 Q You're not qualified as an expert
16 on antitrust laws, correct?

17 A Absolutely.

18 Q How many people work for the Bureau
19 of Consumer Protection?

20 A The whole bureau?

21 Q Yes.

22 A I don't know. I know that the

1 entire Federal Trade Commission during the
2 period when I was there, including all of the
3 Washington offices and all of the satellite
4 offices, was less than a thousand people.

5 The division of advertising
6 practices had a low of about 12 attorneys up
7 to a high of about 30 or 40. I mean --
8 there's five divisions in Consumer
9 Protection.

10 Q So your division, the tobacco
11 advertising program?

12 A No. No, Bureau of Consumer
13 Protection, five divisions; ad practices,
14 marketing practices, credit practices, et
15 cetera.

16 Ad practices would have had -- when
17 I joined the Federal Trade Commission, ad
18 practices was actually three divisions that
19 were then joined together, so it was a very
20 large group of about 40 or 50. During
21 the '80s it became a very small division of
22 about 12 attorneys. When I left, I think

1 there were about 30, 35. Those are all
2 approximations.

3 Q Let me go back to the larger group,
4 the Bureau of Consumer Protection.

5 A Of Consumer Protection.

6 Q What industries did they work in?
7 Everything?

8 A No, you couldn't do -- let's see --
9 agricultural cooperatives couldn't do,
10 couldn't do banks, couldn't do -- what else
11 were we prohibited from? At any given time
12 there were lots of prohibitions.

13 Q So what did they work on?

14 A The entire Bureau of Consumer
15 Protection?

16 Q Yes. Clothing advertisements?
17 Give me some examples.

18 A Are you asking me what my division
19 did or what the entire bureau did?

20 Q The bureau. I'm asking you about
21 the bureau.

22 A See, I mean the bureau did things

1 on credit practices that I don't have much
2 information on. I mean so they had the
3 entire credit industry over there that I
4 don't know anything of.

5 Marketing practices did fraud.
6 Fraud always involved small people doing lots
7 of really crazy things. Can't do doctors,
8 but we can do clinics. Service industry
9 practices, got into whole areas that I wasn't
10 familiar with.

11 I can tell you what, you know, my
12 division did and I can tell you that, you
13 know, except for what the -- unless we were
14 precluded by law the Bureau of Consumer
15 Protection dealt with every industry except
16 those from which it was -- was forbidden to
17 deal with.

18 In advertising practices we dealt
19 with advertising for food, drugs, cosmetics,
20 alcohol, tobacco, firearms, air filters,
21 automobiles, gasoline, services, and on and
22 on and on.

1 Q Now, you've never served on the
2 commission itself, correct?

3 A Correct.

4 Q So for your whole period of time
5 you were at the FTC you were always a member
6 of the staff; is that correct?

7 A Correct.

8 Q You always reported to someone else
9 when you were at the FTC?

10 A Correct.

11 Q You were never the final decision
12 maker during the whole time you were there,
13 correct?

14 A Correct, absolutely.

15 Q Reported to the head of the Bureau
16 of Consumer Protection?

17 A I reported to the associate
18 director for advertising practices, who
19 reported to the bureau director of the Bureau
20 of Consumer Protection, who reported to the
21 five commissioners.

22 Q So how many layers were there

1 between you and the commission?

2 A At different times there were more
3 layers. But, basically, I would say the
4 commissioners to the bureau director to the
5 associate director to the assistant director.

6 Q Now, during your time there your
7 focus was mostly on tobacco products; is that
8 correct?

9 A Up until 1983 I did no tobacco.

10 Q From 1983 forward was it mostly
11 tobacco?

12 A At some times less than half of the
13 time would be tobacco and at other times it
14 might be all of it. I worked on
15 environmental guidelines, I worked on the 900
16 telephone number rule making. So there were
17 a lot of major projects. I often would take
18 over major projects that -- that came their
19 way.

20 Q Did you ever work on issues
21 relating to alcohol?

22 A Yes.

1 Q Caffeine?

2 A Caffeine. You know what? Caffeine
3 would come up now and again, but we never
4 brought a case on it.

5 Q Did you work on issues relating to
6 caffeine?

7 A Tangentially.

8 Q How about other foods?

9 A What food -- well, I -- as said, I
10 was -- for a brief period of time I oversaw
11 the food cases. Oh, and I did the food rule.
12 We -- I worked with the Bureau of Economics
13 on the FTC's comments to FDA on the -- during
14 the food labeling health claims period.

15 Q Would it be fair to say that your
16 main responsibility was to continuously
17 review and monitor advertisements by Reynolds
18 and Reynolds' competitors to make sure that
19 none of the ads were misleading?

20 A Continuously review?

21 Q Yes.

22 A For most of the period -- I don't

1 know. I'm not comfortable with that
2 description.

3 Q Well, let me see if I can break it
4 down.

5 A From -- from 1983 on I was -- I was
6 a supervisor and a manager and so my personal
7 responsibility would be to make sure things
8 got done.

9 I also had individual
10 responsibilities because it's a small staff.
11 So if you want to include what I did myself
12 and what others did for me, our
13 responsibility was to monitor all advertising
14 of all products at all times as best we
15 could.

16 Q Including cigarette ads?

17 A Including cigarettes ads.

18 Q Did you always take your job very
19 seriously?

20 A Yes.

21 Q You had a number of people who
22 worked on your staff who also reviewed and

1 monitored the cigarette ads; is that right?

2 A Yes.

3 Q They always took their jobs
4 seriously?

5 A Yes.

6 Q Would you consider you and your
7 staff a committed group of people in
8 reviewing the cigarette ads?

9 A Committed.

10 MR. PATRICK: I'm going to object.

11 BY MS. PARKER:

12 Q Let me rephrase it.

13 Were you and your staff always
14 committed to seeing that there were no ads
15 out there that were misleading?

16 A The Federal Trade Commission
17 division of advertising practices, even when
18 it had 30 lawyers, and -- was responsible
19 for, theoretically, every national ad that
20 ever appeared, which was impossible.

21 We -- we publicly stated at any
22 number of times that the way that the Federal

1 Trade Commission got the ads and the cases
2 that it pursued were -- were several. We
3 received complaints from watchdog groups, we
4 received complaints from the Hill, we
5 received complaints from citizens.

6 We did as much ad monitoring as was
7 possible for such a small staff. This
8 wouldn't -- this wouldn't be true of
9 cigarettes, but we -- we would download -- we
10 would do a -- a period of time where we would
11 download all of the ads off of television and
12 then sit in the room and watch them. But,
13 again, that's not 365 days a year. We would
14 take a period and do a sweep.

15 We clipped from magazines and
16 newspapers, but during the '80s most of our
17 budget for clipping of ads in newspapers was
18 cut because our subscriptions were cut. So I
19 can't say that we caught every deceptive ad.
20 I would suspect we caught very -- very small
21 percentage of deceptive ads.

22 But the nature of the Federal Trade

1 Commission was to -- was to execute by
2 example and that hopefully if you brought one
3 case, it would have an effect upon the rest
4 of the field.

5 Q My question was simply did you and
6 your staff consider yourselves committed to
7 the goal of making sure that there were no
8 misleading advertisements?

9 A I -- I'm afraid I have to stick
10 with my -- my answer, which was that there
11 was no way we could ensure that there were no
12 deceptive advertisements.

13 Q Now, you went over a number of
14 different ways, watchdog groups, citizen
15 complaints, et cetera, on how you reviewed
16 the advertisements; is that right?

17 A Right.

18 Q Was that true for cigarette
19 advertising also?

20 A Yes.

21 Q So there were watchdog groups that
22 would call you up or citizens would make

1 complaints, congress would make complaints?

2 A Citizens made enormous numbers of
3 complaints, just plain old citizens, letter,
4 cards.

5 Q This is with respect to cigarette
6 advertising?

7 A Yes. Cigarette advertising was the
8 single -- for the period I was there, was the
9 single most -- the singly largest area of
10 complaints.

11 Q Would you investigate the
12 complaints when you would receive them?

13 A Yes. Many of them would be handled
14 informally between me and John Rupp if they
15 were things that could be handled that way.

16 Q So you and your staff would review
17 and monitor the ads themselves; is that
18 right?

19 Say if someone called you up and
20 said I have a complaint about an ad. You
21 would go look at the ad, right?

22 A Well, not always. I mean I had a

1 trucker who used to call me regularly about
2 billboards he saw down south on Route 95 and,
3 you know, I'd have to -- I'd call up John
4 Rupp and I'd say hey, John, you've got a
5 billboard down there without a warning, and
6 he would send somebody out.

7 Q So somebody would look at the ads
8 or the print ads?

9 A In many cases.

10 MR. PATRICK: Can we take we take
11 about two minutes, five minutes?

12 MS. PARKER: Sure, sure, take a
13 two-minute break.

14 THE VIDEOGRAPHER: 11:31 off the
15 record.

16 (Discussion off the record)
17 (Wilkenfeld Deposition Exhibit
18 No. 10 was marked for
19 identification.)

20 BY MS. PARKER:

21 Q Just as a housekeeping matter, the
22 document that we have just marked as

1 Exhibit 10 in front of you is a copy of your
2 disclosure in this case, correct?

3 A Yeah.

4 Q Before we took a break we were
5 talking about all of the different groups,
6 the individuals who contacted the FTC to
7 complain about ads.

8 A Correct.

9 Q I want to continue asking you some
10 questions about that. Would from time to
11 time anti-tobacco groups contact you to
12 complain about ads?

13 A Yes, we received written complaints
14 from -- let's see. During the period I was
15 there it would have been primarily the
16 Coalition on Smoking or Health. I'm trying
17 to think if we heard from other -- other
18 groups. We would sometimes hear from Public
19 Citizen and I don't think CSPI ever came
20 forward on any tobacco case.

21 Q Would they call up and say hey,
22 there's an ad or send you a letter?

1 A No, no, they would send a
2 complaint.

3 Q They would send you a complaint and
4 they'd say we have a concern about this ad,
5 you need to check it out?

6 A When we would get a complaint from
7 a watchdog or a public interest group, it
8 would usually come in with much more
9 information. It could be anywhere from an ad
10 with a letter describing their concerns or it
11 could be a full-scale, you know, written
12 complaint with legal citations and factual
13 support and things like that. So it could be
14 either of those.

15 Q Besides the groups did you get
16 complaints from individuals about cigarette
17 advertisements while you were at the FTC?

18 A Yes.

19 Q Would you consider those citizen
20 complaints?

21 A Yes.

22 Q It sounds like there's a pretty

1 wide group of folks who complained about
2 cigarette advertisements while you were at
3 the FTC; is that fair?

4 A Yes.

5 Q Then what would happen is you would
6 get a complaint or you'd get a notice from
7 some group or individual that they had a
8 concern about an ad and then you or your
9 staff would determine whether or not that ad
10 needed to be challenged. Is that how it
11 worked?

12 A Right, but I also -- we also came
13 up -- sometimes an ad was challenged on the
14 basis of our review alone without a
15 complaint.

16 Q So sometimes you didn't get a
17 complaint, the staff itself?

18 A Right.

19 Q But you would have to make a
20 recommendation to the bureau chief about
21 whether or not to challenge the ad; is that
22 correct?

1 A Right. Most cases in cigarette
2 advertising, like in all advertising, you
3 know, 80, 90 percent of the complaints would
4 not result in a recommendation to the bureau.

5 Q You had to make the recommendation
6 to the bureau chief because you were not the
7 final decision maker on that?

8 A Right.

9 Q So you'd present your views to
10 others and if they agreed with you, then they
11 would open an investigation? Is that how it
12 would work?

13 A Over the 11 -- is it 11 -- 11 years
14 of tobacco it changed -- things changed. So
15 that sometimes you made a recommendation --
16 well, you were allowed to do an initial-phase
17 investigation on your own. If you wanted to
18 go into what was called full-phase, you had
19 to then bring it to the bureau.

20 Now, at one period of time that
21 required getting into a full-scale analysis
22 along with a bureau of economic analysis that

1 would then be moderated by the bureau
2 director. At other times it was more of just
3 a recommendation to the bureau director who
4 would say yeah, go ahead. So it really
5 depended upon the period of time and -- and
6 who was bureau director.

7 Q But before you could challenge any
8 particular ad you would have to get approval
9 from the commission that there was some
10 evidence that warranted your issuing the
11 complaint against the company?

12 A Nobody can issue a complaint except
13 the commission. So it didn't matter even
14 what the bureau director thought. The five
15 commissioners issue a complaint period.

16 Q So that was not your decision?
17 That was the commissioners?

18 A It was definitely the five elected
19 commissioners. Whether you start an
20 investigation and send a demand letter was
21 almost exclusively your own decision.

22 Q Now, during this period of time you

1 were at the FTC working on tobacco
2 advertisements would it be fair to say that
3 you reviewed thousands of advertisements for
4 cigarettes?

5 A In the course -- one way or the
6 other, yes if you want to put in
7 advertisements everything including trinkets
8 and trash, sponsorship, dah, dah, dah, dah,
9 yes.

10 Q Would it be thousands every year of
11 cigarette advertisements or --

12 A It really depended upon whether I
13 had an active investigation of a cigarette
14 company ongoing.

15 Q So some years you would review
16 thousands and other years it would be less?

17 A Yes.

18 Q So the FTC was heavily involved in
19 monitoring cigarette advertisements, that's
20 correct, isn't it?

21 A Well, you know, we would always be
22 asked how big -- how big is your staff.

1 I know, but the only way I can tell
2 you about heavily is to say that there was
3 one person responsible for doing it and that
4 the rest of the staff would be added as
5 needed. So --

6 Q Well, whether it's one person or a
7 whole staff or what the size of the staff is,
8 isn't it correct that the FTC was heavily
9 involved in monitoring cigarette
10 advertisements while you were there?

11 A The FTC considered tobacco
12 advertising to be one of its primary
13 responsibilities.

14 Q That's been the case since around
15 the 1940s?

16 A Since the 1940s. That I can't
17 attest to. I can only attest to from 1980
18 on.

19 Q Sitting here today do you have any
20 reason to dispute that the FTC has been
21 heavily involved in monitoring cigarette
22 advertisements since the 1940s?

1 A Well, I would certainly say
2 from 1964 on and from what I could tell from
3 my historical reading, it was certainly true
4 in the '50s. I don't know what went on in
5 the '40s.

6 Q Now, of all the cigarette
7 advertisements that you and your staff and
8 the FTC reviewed, how many complaints were
9 actually issued against cigarette companies?

10 A During?

11 Q During your time there.

12 A During my time. Let's see. Brown
13 & Williamson, R.J. Reynolds, American Brands,
14 Pinkerton. Let's see that was probably the
15 four. We did several rule makings which
16 would be industry wide, which would have used
17 up our resources. We did --

18 Q All I need to know is how many
19 complaints were actually issued. How many?
20 Do you know a number?

21 A I think it's four. I hope I'm
22 right.

1 Q Let me see if I can go over those
2 four. One was Barclay; is that correct?
3 A Brown & Williamson.
4 Q American Brands was what ad?
5 A Carlton.
6 Q What was Pinkerton?
7 A Redman Tractor Pull.
8 Q That's not a cigarette?
9 A Of course it is.
10 Q That's not a cigarette?
11 A No, but it's tobacco. I mean the
12 program had to do both. It was a violation
13 of the T.V. ad ban, the first case that was
14 brought on either cigarettes or smokeless.
15 Q That was not for a cigarette,
16 correct?
17 A No, smokeless tobacco.
18 Q What was the other that you
19 mentioned?
20 A At R.J. Reynolds.
21 Q Which one?
22 A Of Cigarettes and Science, MRFIT.

1 Q So out of all of these thousands
2 and thousands of cigarette ads that you and
3 your staff and the FTC reviewed during
4 that 14-year period you were there, the
5 commission only issued complaints against
6 three cigarette ads; is that correct?

7 A Yes.

8 Q Among you and your staff and all
9 these people, the watchdog groups and the
10 individuals that you've told us about, all of
11 these people who were monitoring cigarette
12 ads, you're only able to come up with these
13 three cigarette ads that warranted issuing a
14 complaint?

15 A No, absolutely not. There were
16 many more that warranted complaint.

17 Q Did you ever give legal advice to
18 the FTC that other ads be investigated?

19 A I think we're getting into matters
20 that -- that are predecisional.

21 Q Does that mean privileged?

22 A Uh-huh. But I can -- I can say,

1 generally, that the process that the FTC goes
2 through is to, as I said, to teach by
3 example. So it would not bring a case on
4 every matter that deserved litigation.

5 Cases might resolve out because a
6 company decided that it would -- it would --
7 it would take the action that the commission
8 required and the commission would not go
9 forward with even getting the consent.

10 Q Let me interrupt you if I can. I
11 want to object and move to strike that
12 response.

13 A Okay.

14 Q Here's my question: Did you ever
15 give legal advice to the FTC that other ads
16 besides these three we've talked about, that
17 other cigarette ads be challenged?

18 A You're talking about -- when you
19 say the commission, you mean the five
20 commissioners or do you mean anybody in the
21 commission?

22 Q Anybody over your head.

1 A Absolutely.

2 Q Yes?

3 A Yes.

4 Q Which ads? Tell me which ads that
5 you recommended --

6 A I think I only feel comfortable
7 telling you about one at this point.

8 Q When you say you only feel
9 comfortable, are you saying that --

10 A I think the rest is -- is
11 confidential.

12 Q Are you refusing to answer on the
13 grounds of privilege?

14 A I would have to check with the FTC
15 to find out.

16 Q Sitting here today are you
17 declining to answer the question because of
18 privilege?

19 A Well, I -- as I said, let me tell
20 you about the one that I did -- this one I
21 recommended to the commission and the
22 commission denied the complaint and that was

1 R.J. Reynolds Joe Camel advertising.

2 Q Let me go back to my question that
3 I have pending. Are you declining to answer
4 questions today on the ground of privilege
5 relating to --

6 A I'm willing to tell you --

7 Q Let me finish my question please,
8 ma'am.

9 Is it your position today that
10 you're declining to answer questions on the
11 basis of privilege relating to any advice
12 that you gave to the FTC, the head of the
13 bureau, anybody over your head at FTC
14 relating to whether or not other cigarette
15 advertisements should be challenged?

16 A As far as the names of those
17 companies?

18 Q Well, I have a series of questions
19 I'm going to ask you. Well, first the names
20 of the ads. Are you declining to answer that
21 because of privilege or can you answer that?

22 MR. PATRICK: Well, let me assert

1 an objection at this point, although I don't
2 represent the Government, that there may be
3 some areas, and Ms. Wilkenfeld will probably
4 have to define those areas since she was a
5 lawyer for the FTC, as to those issues that
6 would be covered by a privilege or some
7 confidentiality issues or protection of
8 confidentiality, so I'm making an objection
9 on the basis of your questions that would go
10 into areas that are privileged, but I'm going
11 to have to basically defer to the witness as
12 to where those areas are since I don't
13 represent the Government.

14 THE WITNESS: I'm going to have --
15 I checked with the FTC before coming and said
16 what can I talk about and -- and cases that
17 are closed there is no problem. But as far
18 as attorney work product and confidential
19 communications, I don't feel comfortable -- I
20 guess I'm asserting a privilege. I'm
21 declining.

22 BY MS. PARKER:

1 Q I want to make sure it's clear for
2 the record. Are you refusing to answer the
3 questions on the grounds of privilege?

4 A Yes.

5 Q Who did you talk to at the FTC?

6 A You mean about these various cases?

7 Q Regarding whether or not you could
8 testify today.

9 A Christian White.

10 Q Who is that?

11 A He's in the general counsel's
12 office. He's the -- their ethics officer.

13 Q Were you aware that I had sent a
14 letter to the plaintiff's lawyers inquiring
15 as to whether or not a lawyer for the
16 Government would be present today?

17 A Right, uh-huh.

18 Q You're aware of that?

19 A Yes.

20 Q Did you take that letter to the FTC
21 and say are you coming to the deposition?

22 A No, they said that they didn't feel

1 they needed to come.

2 Q They would leave it up to you to
3 assert the privilege?

4 A You know, the questions I asked
5 them about what I thought -- I told them that
6 I thought I would have to be testifying on
7 issues relating to cases that I had brought
8 and that were now closed, would there be
9 problems with that, and they said no, those
10 cases are X number of years old.

11 There is no -- there is no
12 privilege that you can assert as to those
13 cases. So that is what I discussed with
14 them. I did not discuss with them matters
15 of -- of a predecisional nature that never --
16 that never became cases.

17 Q Well, I just want to make sure you
18 and I are clear here.

19 A Uh-huh.

20 Q You're declining to answer my
21 questions on the grounds of privilege that
22 you are asserting on behalf of the

1 Government?

2 A I'm asserting them on, yeah, on
3 behalf of the Government.

4 MR. PATRICK: Let me --

5 THE WITNESS: Well, I think they're
6 my privilege. I don't know. I mean I'm
7 the -- I was the attorney. I mean this was
8 stuff we always asserted a privilege.

9 BY MS. PARKER:

10 Q Do you understand as a lawyer that
11 the client holds the privilege?

12 A Well, I've never -- maybe I have to
13 ask my lawyer who has to assert this
14 privilege.

15 MR. PATRICK: Well, the client does
16 have the privilege, but the lawyer is
17 required to remain silent until the client
18 releases the lawyer from the privilege.

19 BY MS. PARKER:

20 Q You have not been so released?

21 A Right. Thank you for that
22 clarification.

1 Q You mentioned the recommendation
2 you made to the FTC to challenge the Joe
3 Camel ads?

4 A Correct.

5 Q So you recommended that those ads
6 be challenged; is that correct?

7 A Correct.

8 Q But despite your recommendation,
9 the FTC decided not to issue a complaint
10 against those ads, correct?

11 A Correct.

12 Q The commission rejected your
13 recommendation with respect to those ads,
14 correct?

15 A They did.

16 Q The FTC decided not to issue a
17 complaint against those ads because they were
18 not misleading, correct?

19 A The FTC refused to issue the
20 complaint on a three-to-two vote because they
21 said they had -- they did not have reason to
22 believe that the law had been violated.

1 Q They did not have reason to believe
2 that those ads were misleading, correct?

3 A Misleading -- well, I hadn't
4 charged misleading. I charged unfairness.

5 Q There was no evidence to show that
6 they were unfair, correct?

7 A They had no reason to believe.

8 Q Now, 1994, that's the period of
9 time when you left the FTC and went to the
10 FDA, correct?

11 A Correct.

12 Q Did the FTC's decision to reject
13 your recommendation about the Joe Camel ads
14 have any role in your decision to leave the
15 FTC?

16 A No, I would not have left just
17 because of that.

18 Q Have you ever been a party to a
19 lawsuit? Have you ever been a party --

20 A You mean not as a lawyer?

21 Q Have you ever been a party? Like a
22 plaintiff or defendant?

1 A You know, I -- I wish I could say
2 yes or no. When my father died, I inherited
3 a lot of his stock and apparently I'm in some
4 class actions that I didn't know about, but
5 other than that I have never knowingly been a
6 party to a lawsuit.

7 Q Have you ever been the subject of a
8 disqualification motion?

9 A A disqualification motion. Where?

10 Q Any court or any administrative
11 body.

12 A Yes.

13 Q Tell me about that.

14 A Motion.

15 Q Tell me about that.

16 A U.S. Tobacco filed first a letter
17 and then a complaint with the Federal Trade
18 Commission asking that I be disqualified from
19 tobacco matters I think.

20 Q On what basis?

21 A Prejudice and bias.

22 Q Have you ever been subject to a

1 disciplinary complaint?

2 A No.

3 Q Now, as I understand it from your
4 CV, when you joined the FDA in 1994, your
5 title was special advisor for tobacco policy;
6 is that --

7 A When I joined the FDA initially, I
8 was on a detail so that I was still
9 technically an FTC employee on loan to the
10 FDA. So I was a special advisor -- my -- my
11 title time became very fluid. I was special
12 advisor to the commissioner.

13 Q Special advisor to the
14 commissioner?

15 A Uh-huh.

16 Q So that was the position you held
17 at FDA?

18 A I held that position until it
19 became permanent in -- it was in January --
20 must have been probably '96. Yeah, I think I
21 had two extensions on my detail or one.

22 Q Did you ever get a promotion while

1 you were at the FDA?

2 A Yes.

3 Q Tell me what your new titles were.

4 A Well, I was appointed to the senior
5 executive service first on a limited basis,
6 which is a limited term, and then on a
7 permanent basis. When I became a member of
8 the permanent staff at FDA, my title, I
9 think, was special advisor to the
10 commissioner for cigarette advertising
11 initiatives or something like that.

12 Q Now, let me ask you about this
13 period of time you were at the FDA.

14 A Yes.

15 Q Am I correct that during the entire
16 period of time you were at the FDA you were
17 never the final decision maker on tobacco
18 issues?

19 A For sure.

20 Q Now, I understand when you were at
21 the FDA you drafted a proposed rule that
22 alleged much of the same impact of cigarette

1 marketing on youth that you worked on while
2 you were at the FTC; is that correct?

3 A I drafted the -- I was the primary
4 drafter of the advertising provisions of
5 the -- of the rule making on tobacco
6 advertising. The standard was much different
7 than that of the FDA, so --

8 Q It was the same basis, though, for
9 challenging the Joe Camel ads when you were
10 at the FTC; is that right?

11 A No.

12 Q Different basis?

13 A Many more bases. Joe Camel was an
14 example only.

15 Q But it included some of the same
16 bases that you had argued at the FTC; is that
17 right?

18 A What I argued to the FTC was that
19 the R.J. Reynolds Tobacco Company violated
20 Section 5 unfairness provisions because of
21 its advertising with Joe Camel. What we
22 spelled out on the rule making in -- at FDA

1 had to do with ubiquity, with effect, with --
2 not -- I mean all advertising. I mean it was
3 not based -- predicated on anything like an
4 unfairness analysis.

5 Q So you tried to challenge the ads
6 at the FTC and they rejected your
7 recommendation and then you went to the FDA
8 and you tried again using a different
9 argument?

10 A Well, I wouldn't characterize it
11 that way, no.

12 Q How would you characterize it?

13 A I would characterize it that I
14 had -- I had developed a case at the FTC
15 to -- to challenge Joe Camel's advertising
16 under very limited authority that the FTC had
17 at that time.

18 When I went out to the FDA, David
19 Kessler asked me to look at the question of
20 tobacco advertising under -- what's the
21 provision -- 501(c)(3) of the Food, Drug &
22 Cosmetic Act, which is remarkably different,

1 and in order to discuss it I would probably
2 need to have a copy of the Food, Drug &
3 Cosmetic Act, which I don't -- didn't bring
4 with me.

5 It had to do with sales use, that
6 products that are inherently dangerous, that
7 require special -- that require special
8 restrictions, that you can have restrictions
9 on the sales use, distribution use. So it
10 was a very different legal theory.

11 Q You tried to challenge the ads at
12 the FTC under what you call a very different
13 legal theory?

14 A Correct.

15 Q Were unsuccessful. Then you went
16 to the FDA and you tried again using a
17 different legal theory; is that correct?

18 A No. One had to do with the
19 advertising of one company and the other had
20 to do with the advertising of an entire
21 industry.

22 Q Now, when you drafted this proposed

1 FDA rule, you were aware, weren't you, that
2 congress had repeatedly denied jurisdiction
3 over tobacco products; isn't that correct?

4 MR. PATRICK: I'm going to object.

5 THE WITNESS: Yeah.

6 BY MS. PARKER:

7 Q You can answer my question. Were
8 you aware of that?

9 A That congress had repeatedly
10 denied. I can -- you know, if you want me to
11 engage in an argument, congress had also
12 never taken it away. I mean congress took
13 away jurisdiction from the Consumer Product
14 Safety Commission. It never denied FDA
15 jurisdiction. FDA jurisdiction clearly fell
16 within the ambit of FDA's authority.

17 Q I move to strike that response as
18 unresponsive. Here's my question: When you
19 drafted the proposed rule at the FDA, were
20 you aware, just yes or no, were you aware
21 that congress had repeatedly denied
22 jurisdiction over tobacco products to the

1 FDA?

2 A Congress had never denied juris --
3 MR. PATRICK: Whoa. I'm going to
4 object to the form of the question, preserve
5 that. You can answer.

6 THE WITNESS: They never denied --
7 they never acted to deny ever.

8 BY MS. PARKER:

9 Q Would you agree that congress
10 ultimately determines whether or not the FDA
11 has jurisdiction over those issues?

12 A I believe that congress grants
13 authorities to agencies and gives them
14 authority to determine within certain --
15 certain basic parameters what their
16 jurisdiction is. If tobacco does not fall
17 within that jurisdiction, then it would be up
18 to congress to -- to do that.

19 Q Whether that FDA rule that you
20 drafted is a valid exercise of FDA
21 jurisdiction is now before the Supreme Court?

22 A Can I go back when you say I

1 drafted? I drafted, but you are right, I'm
2 not the final decision maker. I drafted, it
3 gets redrafted, et cetera, so --

4 Q You're just a staff person?

5 A I'm just a staff.

6 Q Why did you leave the FDA?

7 A Wait a minute. Can I answer your
8 other question? The Supreme Court is going
9 to decide.

10 Q Why did you leave the FDA?

11 A I left the FDA because I could
12 retire.

13 MS. PARKER: It's ten after 12:00.
14 Would y'all like to take a break for lunch
15 here?

16 MR. PATRICK: It's fine with me.

17 THE VIDEOGRAPHER: 12:07 off the
18 record.

19 (Whereupon, at 12:07 p.m., a
20 luncheon recess was taken.)
21
22

A F T E R N O O N S E S S I O N

(1:02 p.m.)

Whereupon,

JUDITH B. WILKENFELD

was recalled as a witness and, having been
previously duly sworn was examined and
testified further as follows:

EXAMINATION BY COUNSEL FOR DEFENDANT

R.J. REYNOLDS CONTINUED

BY MS. PARKER:

Q Ms. Wilkenfeld, are you ready to
get started?

A Uh-huh.

Q Before the break we had discussed
Joe Camel?

A Right.

Q I have some more questions I want
to ask you about that. Are you familiar with
a 1991 study by DiFranza that was published
in the Journal of the American Medical
Association?

A Yes.

1 Q Have you ever read that study?

2 A Uh-huh.

3 Q Have you ever relied on that study?

4 A Relied on that study. I did not
5 rely on it in the commission recommendation
6 to the commission. I'm trying to remember if
7 I even cited it to them. If I did, I cited
8 it factually, but I did not rely on it. I
9 don't remember whether I cited it in the
10 FDA -- if I cited it, I only cited as one of
11 many. I didn't consider it the best of the
12 studies that was done at that time.

13 Q Do you know whether anyone else at
14 the FTC relied on the DiFranza study?

15 A That would have happened after I
16 was there.

17 Q You don't have any knowledge?

18 A I didn't follow that litigation
19 closely.

20 Q Do you know whether anyone else at
21 the FDA has relied on the DiFranza study?

22 A I don't have any knowledge one way

1 or the other.

2 Q When you considered bringing the
3 action against Reynolds, is it your testimony
4 that you did not rely on the DiFranza study
5 at that point?

6 A I looked at that study and decided
7 that it would not be convincing to the
8 commission.

9 Q Are you aware of DiFranza's
10 research methods?

11 A Personally?

12 Q Yes.

13 A No.

14 Q Do you have any secondhand
15 knowledge?

16 A I've seen some correspondence which
17 called in to question one of his studies and
18 other than that, I don't, as I say, didn't
19 rely on that at the commission and I'm trying
20 to remember whether it came up. I mean his
21 work at times would come up at the -- at the
22 FDA.

1 Q Do you consider his study to be
2 properly designed based on what you know now?

3 A The Joe Camel one?

4 Q Yeah, the 1991 JAMA article.

5 A I didn't spend a lot of time on it,
6 so I really couldn't tell you whether I
7 thought it was properly designed.

8 It was definitely not the kind of
9 evidence that the Federal Trade Commission
10 would have been interested in.

11 Q Say some of his research methods
12 have been called in to question; is that your
13 language?

14 A Yes.

15 Q What did you mean by that?

16 A I have the correspondence -- I
17 can't remember. It was probably from
18 Reynolds, that said that he had -- he was
19 prejudiced and that his -- his methods,
20 therefore, were questionable. As I say, I
21 did not pursue it because I've not used his
22 work.

1 Q Because his work is not of the
2 caliber work that you would rely on?

3 A No. The commission -- this was not
4 the type of evidence that the Federal Trade
5 Commission would rely on.

6 Q Now, before the break you testified
7 that you felt other ads besides Joe camel
8 warranted investigation or action.

9 A Uh-huh.

10 Q Do you remember that?

11 A Uh-huh.

12 Q How many ad programs or ads
13 warranted investigation or action?

14 A This would be a very rough guess.
15 Well, depending upon what you meant would
16 have warranted, whether those would have been
17 ones that we would have looked at and just
18 dropped because of -- 10, 20, 30. I don't
19 know.

20 At various stages along the way. I
21 mean some would have been dropped -- at the
22 commission if you had a suspicion, you were

1 supposed to open up a case number and send
2 out a demand letter. So in some cases you
3 didn't get that far. You had suspicions, you
4 talked with someone.

5 Said no, let's resolve this one
6 without going any further. You might have
7 opened up a number, sent out a demand letter
8 and then still dropped it.

9 Q How many demand letters did you
10 send out for matters that the FTC did not
11 issue a complaint for?

12 A In tobacco?

13 Q In cigarette ads.

14 A Cigarette ads. It would be more
15 than 5, probably be less than 20.

16 How would you count the fact that
17 on the -- the MFRIT one, for instance. That
18 was a -- that was one ad of many. I would
19 have sued on many more than just the one. I
20 mean does that count? I mean we talked with
21 R.J. R about those.

22 Q Well, my question goes to the

1 number of demand letters that you sent out.

2 A Yes. Access letters they became.

3 As I said, more than 5, less than 20. I

4 can't be more specific.

5 Q More than 5, less than 20?

6 A Uh-huh.

7 Q Identify those ads or advertising

8 programs for me, please.

9 A That's what I wouldn't do before.

10 I'll assert a privilege.

11 Q So you're refusing to answer that

12 question on the basis of privilege?

13 A Yes.

14 Q Can you describe them generically

15 for me?

16 A Many cases had to do with new

17 products, some cases had -- newer, novel

18 products, some had to do with -- the rest

19 would be deception, simply deception. There

20 were no other unfairness cases.

21 Q Owe other unfairness cases besides

22 Joe Camel?

1 A In tobacco.
2 Q With respect to cigarette
3 advertising?
4 A Absolutely.
5 Q So the others were based on the
6 theory of --
7 A Deception or misleading or
8 unfair -- yeah. The rest would have been
9 based upon deception or misleading.
10 Q Did any of those ads that we're
11 talking about relate to the FTC method?
12 A Probably. Probably.
13 Q Which ones?
14 A Privileged again. Well, I can tell
15 you that I -- we -- we received a complaint
16 from the -- we received a complaint from the
17 Coalition on Smoking or Health about low tar
18 advertising. Any demand letters that would
19 have been sent out in response to that
20 complaint would have involved the FTC method.
21 Q But the FTC did not challenge any
22 ads on that basis?

1 A That's right. That's right.
2 Q That's correct?
3 A That's correct. Except for the
4 American Brands.
5 Q That's the Carlton ad that we
6 talked about previously?
7 A Yeah, uh-huh.
8 Q Who did you make your
9 recommendation to regarding these demand
10 letters, whether or not they should be sent
11 out?
12 A Lee Peeler. Well, Wally Snyder up
13 until he left and then Lee Peeler. When did
14 Wally leave?
15 Q Mr. Snyder then Mr. Peeler were
16 your immediate bosses?
17 A Right.
18 Q Did your recommendations go any
19 further up the ladder?
20 A For a demand letter they don't.
21 Q So your immediate boss rejected
22 those recommendations without --

1 A No, then other demand letters went
2 out, but you asked -- you asked how many
3 resulted in demand letters that didn't become
4 cases.

5 Q Right.

6 A Right. So the demand letters went
7 out.

8 Q Who made the decision that they not
9 become cases, in your words?

10 A Sometimes me, sometimes the bureau
11 director. It could be any number of reasons.

12 Q How can you tell which
13 investigations are closed at FTC now that
14 you've left?

15 A Now, that's -- you know, I never --
16 let's see. I'm trying to remember my FOIA
17 law. You get a log of closed cases -- what I
18 said was I'm trying to remember FOIA law. I
19 think if they're closed at a certain point in
20 time -- I think you can get at some point
21 the -- the case numbers. You know, I don't
22 know. But whatever the commission gives out

1 as far as FOIA would be how you would
2 determine.

3 Q So you may, in fact, be able to
4 answer some of my questions. You just don't
5 know whether these matters are closed or not?

6 A No, I don't know whether that
7 information is public. I'm sorry. I just
8 didn't do enough FOIA work to know what --
9 which ones of those things they let out. I
10 know that the one thing that -- that we
11 always were very careful, because we were
12 told it was confidential, was the name of a
13 company under investigation that was closed
14 without a complaint being issued. So it may
15 be that those cases never do become -- those
16 numbers never do become public.

17 Q But you just don't know?

18 A That's correct.

19 Q So it may be that you are able to
20 testify on those issues?

21 A If it's true that those case
22 numbers and names are public, then I could

1 certainly testify as to those, but as I said,
2 I was always told never to mention a case,
3 that it was confidential if you were
4 investigating a company and it did not result
5 in a complaint being issued.

6 Q Well, I thought you said this
7 morning that the advice that you got from the
8 FTC was that you could testify regarding
9 matters that are closed.

10 A Yeah, the two cases that were
11 closed because those issues -- those became
12 complaints, in one case it went through trial
13 and in the other case it was a consent order
14 that was accepted by the commission and three
15 years after that that's closed. Then it's no
16 longer confidential. But the existence of
17 that is always known because at the point
18 when a complaint is either issued or a
19 consent accepted, that is -- that is public
20 information. So you can talk about those.
21 These are cases in which nothing happened.

22 Q So are you saying that you can only

1 testify about matters for which a complaint
2 was brought and the case is now closed?

3 A Well, no. If a complaint was
4 brought, there are things you can testify to.
5 You can't necessarily testify to everything
6 about that. Once it's -- my question to the
7 FTC was very narrow. I haven't been at the
8 FTC since 1994.

9 Therefore, anything I worked on
10 that had become public would have been closed
11 more than three years prior to my testimony.
12 So my question was what could I testify to
13 regarding cases that had reached a conclusion
14 and been closed more than three years prior
15 to today. It was a very -- very narrow
16 question that I asked.

17 Q So you didn't get any advice from
18 the FTC that the FTC prohibited you from
19 testifying on any other issues; is that
20 correct?

21 A Correct. Any other issues. We may
22 have talked generally about policy. I mean

1 the -- the questions that surround the
2 operation of the -- the FTC lab were not
3 matters in anticipation of the litigation and
4 my understanding is I can testify about
5 those.

6 Q Any other matters that the FTC
7 advised you you could not testify about?

8 A No.

9 Q So you just on your own today have
10 decided to assert the privilege with respect
11 to these other matters?

12 A Matters that -- investigations that
13 did not become public, yes.

14 Q The FTC did not advise you before
15 your deposition that you could not testify
16 regarding that topic of investigations?

17 A Not since I left the commission,
18 no. At the time that I was at the commission
19 the -- it was very specific that you could
20 not talk about nonpublic investigations that
21 did not become final. Or did not become
22 public.

1 Q Well, you told me that you had had
2 a discussion with Christian White before your
3 deposition today, correct?

4 A Correct.

5 Q So this prohibition that you're
6 talking about here did not come from
7 Ms. White?

8 A Not during that conversation, no.
9 It came from -- from ethics training during
10 my period of employment.

11 (Wilkenfeld Deposition Exhibit
12 No. 11 was marked for
13 identification.)

14 BY MS. PARKER:

15 Q Let me show you now what we've
16 marked as Exhibit 11. That is a complaint,
17 findings and order of the FTC dated
18 March 31, 1950; is that correct?

19 A Uh-huh.

20 Q Have you seen that document before
21 today?

22 A I don't think so, no.

1 Q Let me bring your attention to page
2 three of the document, the first full
3 paragraph. Ask you if you could just take a
4 moment and read that to yourself.

5 A Is that -- the first full
6 paragraph, is that --

7 Q The one that begins, "The nicotine
8 content."

9 A Page three.

10 (Witness conferred with counsel)

11 THE WITNESS: Are you talking about
12 page one or page three?

13 BY MS. PARKER:

14 Q Page three. Let me see your copy.

15 A "The facts being that the tobacco
16 in question was cured before being
17 purchased."

18 Q Just one moment. Let me show you
19 where to look at.

20 A Okay.

21 Q If you'll look at the bottom of
22 page one. I'm sorry.

1 A The one that says --
2 Q "As respects tars."
3 A Right.
4 Q If you could just read that
5 paragraph to yourself.
6 A Uh-huh.
7 Q Then I'm going to ask you to switch
8 over to page 12, and it's the first full
9 paragraph there on page 12, and ask you to
10 read that paragraph to yourself as well. All
11 right?
12 A No.
13 Q Take your time.
14 A
15 Q The date of this document is
16 March 31, 1950; is that correct?
17 A Uh-huh.
18 Q So will you agree with me that
19 in 1950 the FTC stated that it was not
20 practically possible for tobacco companies to
21 reduce nicotine or tars or to maintain
22 consistency in the amount of tar and nicotine

1 in cigarettes?

2 A I can only say that those two
3 paragraphs you had me read I would much
4 prefer to read the whole thing.

5 Q This document was prepared by the
6 Federal Trade Commission, the FTC, correct?

7 A It purports to be, yeah. I mean I
8 assume it is.

9 Q So isn't it true that back in 1950
10 the FTC stated that it was not practically
11 possible for a tobacco company to reduce tar
12 and nicotine or to maintain consistency in
13 the amount of tar and nicotine in cigarettes?

14 A They did say that.

15 Q That FTC finding was reported to
16 the public at that time; isn't that correct?
17 Do you know one way or the other?

18 A I know it's their usual practice to
19 put a press release out.

20 (Wilkenfeld Deposition Exhibit
21 No. 12 was marked for
22 identification.)

1 BY MS. PARKER:

2 Q Let me show you what we've marked
3 as Exhibit 12. That is an article from the
4 U.S. News & World Report from 1950 that
5 reports on those FTC findings; isn't that
6 correct?

7 A I can't tell whether this is --
8 well, let's see. This appears to be for more
9 than just this one case. I can't -- it looks
10 as if some of this copy comes from more than
11 just this case.

12 Q But it reports on the one case as
13 well, correct?

14 A It appears to be report on some of
15 the findings in this case, yeah.

16 Q Well, it reports over on the third
17 column on the first page that the FTC found
18 that there's no known process by which
19 nicotine and tar may be removed or
20 substantially reduced. Do you see that?

21 A Yes. That's the same as --
22 statement in here.

1 Q That's the same as the order that
2 we just marked?

3 A Right.

4 Q Also let me bring your attention
5 over on the first column, the paragraph next
6 to the one at the very bottom, the ones that
7 begins, "As a general proposition."

8 A Uh-huh.

9 Q This U.S. News & World report
10 article also reports that the FTC found that,
11 as a general proposition, that smoking in
12 moderation is not a appreciably harmful back
13 in 1950. Do you see that?

14 A I see that.

15 Q Now, the FTC said back in 1950 that
16 it was not practically possible to reduce the
17 amount of tar and nicotine in cigarettes, but
18 that is, in fact, what the cigarette
19 companies have done; isn't that true?

20 A The question is that there is no
21 known process by which -- which of the parts
22 are you referring to?

1 Q The tobacco companies have
2 substantially reduced the amount of tar and
3 nicotine in cigarettes from the 1950s level;
4 isn't that true?

5 A Cigarettes or cigarette smoke?

6 Q Tar and nicotine in the smoke.

7 A As delivered to the FTC test
8 machine, yes.

9 Q So, in fact, the cigarette
10 companies have achieved what the FTC said
11 back in 1950 was practically impossible;
12 isn't that true?

13 A Assuming that's what they meant by
14 that, yeah.

15 Q You've heard the term "Tar Derby,"
16 haven't you?

17 A Uh-huh.

18 Q That refers to when the tobacco
19 companies back in the 1950s began advertising
20 their tar and nicotine ratings on their
21 cigarette ads; is that correct?

22 A Uh-huh.

1 Q Is that a yes?

2 A Yes. I'm sorry. Yes.

3 (Wilkenfeld Deposition Exhibit
4 No. 13 was marked for
5 identification.)

6 BY MS. PARKER:

7 Q Let me show you now what we've
8 marked as Exhibit 13.

9 In 1955 the FTC adopted the
10 so-called advertising guides that we marked;
11 is that correct?

12 A They had a series of guides. I
13 want to see which one this is.

14 Q Let me bring your attention to
15 paragraph number two. Indicates that it is
16 relating to tar and nicotine.

17 A Yes. I'm sorry.

18 Q Your answer is yes?

19 A I'm sorry. What was the question?

20 Q In 1955 the FTC adopted these
21 advertising guides, didn't it?

22 A They issued the guides.

1 Q The FTC's purpose was to stop that
2 first Tar Derby; isn't that correct?

3 A It was to ensure that claims not be
4 made unless they were established by
5 competent scientific proof.

6 Q So the FTC tried to stop that first
7 Tar Derby by requiring scientific proof of a
8 better health outcome for those who smoked
9 lower-tar products; is that accurate?

10 A Yes.

11 Q Then bringing your attention to
12 paragraph number two on the first page,
13 specifically the guidelines prohibited the
14 tobacco companies from representing that any
15 brand or cigarette or the smoke therefrom is
16 low in nicotine or tars or contains less
17 nicotine, tars, et cetera, or other
18 substances when it has not been established
19 by competent scientific proof applicable at
20 the time of dissemination that the claim is
21 true and, if true, that such difference or
22 differences are significant?

1 A Correct.

2 Q So as of this period of time
3 in 1955, the FTC prohibited the cigarette
4 companies from telling consumers that tar and
5 nicotine levels in cigarettes unless the
6 tobacco companies could prove it made a
7 significant difference; is that correct?

8 A That was one of the -- one of their
9 provisions.

10 Q So your answer is yes?

11 A Yes.

12 MS. PARKER: Let me show you now
13 Exhibit 14.

14 (Wilkenfeld Deposition Exhibit
15 No. 14 was marked for
16 identification.)

17 BY MS. PARKER:

18 Q This is a copy of the brief in the
19 Brown & Williamson matter, correct?

20 A Uh-huh.

21 Q This is the brief on appeal?

22 A Yeah. I'm just checking to make

1 sure because it's handwritten on the front.

2 MR. HOFFMAN: Excuse me. Whose
3 brief? FTC's?

4 THE WITNESS: Uh-huh.

5 MS. PARKER: Yes.

6 THE WITNESS: Yes.

7 BY MS. PARKER:

8 Q I want to ask you to look at page
9 two up at the top. The FTC included a
10 section in this brief called "A brief history
11 of the Federal Trade Commission's
12 participation in tar and nicotine testing."
13 Do you see that?

14 A Yes.

15 Q In that very first sentence there
16 the FTC admitted -- this brief is dated 1983,
17 so they admitted in 1983 that it has been
18 concerned about the validity of tar and
19 nicotine content claims in cigarette
20 advertising since at least 1955. Do you see
21 that?

22 A Uh-huh, yes.

1 Q You were at the FTC at the time
2 this brief was prepared, correct?

3 A Yes, yes.

4 Q Now, at that time in 1955 it was
5 not possible to prove that lower tar,
6 nicotine made a significant difference; isn't
7 that correct?

8 A I think there were two problems.
9 One, that was there not a test method that
10 was valid; and, two, that the differences
11 maybe mattered.

12 Q Pardon me?

13 A Two, that there was not evidence
14 that the differences mattered.

15 Q Let's set aside the issue about no
16 test method back in 1955.

17 A That was very important though.

18 Q I don't want to ask you about that
19 right now. What I want to ask you about is
20 the other part of your answer.

21 So do you agree that it was not
22 possible to prove in 1955 that low tar, low

1 nicotine made a significant difference, as
2 required by the FTC?

3 A What the FTC was saying was not
4 that it couldn't prove it, but that the
5 companies had not come forward with proof.

6 Q I'm asking you isn't it correct
7 that in 1955 it was not possible for anyone
8 to come forward with that proof?

9 A That I don't know.

10 Q Sitting here today do you have any
11 reason to dispute that?

12 A I know the companies could -- did
13 not come forward with proof at that time.

14 Q My question is, sitting here today
15 do you have any reason to dispute that it was
16 not possible for the companies to come
17 forward with that because there was no such
18 science on the issue at that time?

19 A No, I actually wouldn't say that.
20 I mean I -- I don't know -- from what I've
21 seen in the documents, as I've read them now,
22 the -- the industry knew a whole lot more

1 than we did.

2 Q In 1955?

3 A I don't know, you know. I have not
4 reviewed the documents in that area, but I
5 have seen documents -- I can't say one way or
6 the other. I mean --

7 Q Well, that's not my question. My
8 question is: Sitting here today do you have
9 any basis, any evidence whatsoever to dispute
10 that in 1955 it was not possible for the
11 cigarette companies to prove that low tar and
12 low nicotine made a significant difference?

13 MR. PATRICK: Object to the
14 question.

15 THE WITNESS: What I've said is I
16 can't tell you one way or the other. I don't
17 know what the industry knew. The problem
18 that the FTC has is that it puts the burden
19 on the companies to come forward with the
20 evidence. If the company doesn't come
21 forward with the evidence, it doesn't mean it
22 doesn't have it.

1 BY MS. PARKER:

2 Q Do you have any knowledge, any
3 basis today to indicate that the companies,
4 in fact, had that knowledge back in 1955?
5 You don't, do you?

6 MR. PATRICK: Objection.

7 THE WITNESS: I have no knowledge
8 that they did know it and I have no knowledge
9 that they didn't know it.

10 BY MS. PARKER:

11 Q Now, after this guide came out
12 in 1955 that we've marked as Exhibit 13, the
13 tobacco companies complied with the guide and
14 stopped telling the public the tar and
15 nicotine levels, correct?

16 A That's what the history says.

17 Q Are you aware that the FTC praised
18 the tobacco companies for their compliance
19 with the guide and called it an outstanding
20 example of industry self-regulation? Have
21 you ever heard that before?

22 A I haven't heard it, but I would not

1 have been surprised.

2 Q Now, back in this 1950s time
3 period, when the tobacco companies were
4 prohibited by the FTC from providing that
5 information regarding low tar and low
6 nicotine, that information about low tar and
7 low nicotine was available to the public in
8 the Popular Press, wasn't it?

9 A First of all, the Federal Trade
10 Commission did not prohibit the dissemination
11 of this information. The guideline has no
12 force and effect of -- in law. It is a
13 statement of policy as to the type of cases
14 that the commission might indicate to staff
15 to bring and, therefore, of interest to the
16 affected industry. So, in fact, the industry
17 was not prohibited from doing anything by
18 this guideline. The next question was, was
19 some of this evidence available to the --

20 Q In the Popular Press back in
21 the 1950s.

22 A My understanding from reading the

1 history, solely from the history, is that
2 the -- some of this information was
3 available. I also, if I remember correctly,
4 there was -- there was not one standardized
5 test, so that there was sort of a cacophony
6 of claims.

7 Q Do you recall that consumer reports
8 was providing the low tar and nicotine
9 numbers to the public during the 1950s?

10 A That's what the case seems to
11 indicate here, the Reader's Digest published
12 numbers. But I don't know what methodology
13 they used.

14 Q So you're aware that Reader's
15 Digest did. Are you also aware that consumer
16 reports published tar and nicotine
17 information in the '50s?

18 A I'm trying to remember from what
19 I've read. I smoked in the '50s, but I don't
20 remember, truthfully.

21 Q So let's move up now toward the end
22 of the '50s and the information on tar and

1 nicotine numbers that's out to the public
2 through the Popular Press.

3 A I'm -- in that respect I don't know
4 how many brands those -- the -- the magazines
5 would have published. I don't know if they
6 published all of them or some of them.

7 Q They were publishing something on
8 tar and nicotine numbers, correct?

9 A Something.

10 Q So starting in, say, 1958 many
11 cigarette manufacturers began to put their
12 own tar and nicotine ratings or tar and
13 nicotine ratings from consumer reports and
14 Reader's Digest on the ads; is that correct?

15 A I have no knowledge one way or the
16 other.

17 Q You have no reason to dispute that?

18 A I have no reason to either accept
19 or dispute it. I mean -- I mean if they did,
20 then that would certainly indicate that the
21 guideline was about as effective as
22 guidelines are, which is sometimes they're --

1 they're followed and sometimes they're not.

2 Q Well, let me try to refresh your
3 recollection by asking you to refer back to
4 Exhibit 3, which is the Calfee report?

5 A Now, what I've indicated I haven't
6 read the Calfee report since 1985.

7 Q If you would just look at page 36
8 and see if that will refresh your
9 recollection.

10 A Mr. Calfee seems to feel in that
11 period that -- that they were being
12 published, that they were being put in
13 advertising and the FTC was not challenging
14 it and that congress wasn't happy.

15 Q That Mr. Calfee also says that the
16 FTC allowed this advertising of tar and
17 nicotine content because the numbers were now
18 scientifically. Based do you see that
19 reference?

20 A It says tolerated.

21 Q It says, "Because it was now
22 scientifically based." Do you see that on

1 page 36?

2 A He says, "The FTC apparently
3 tolerated the simple advertising of tar and
4 nicotine contents because the numbers were
5 now scientifically based." He says, "I've
6 not been able to discover much about the
7 FTC's attitude towards this advertising," so
8 that is John's assumption based upon what
9 must have happened as opposed to anything
10 that the commission said.

11 Q Now, as a result of this
12 advertising, the tar and nicotine levels of
13 cigarettes declined rapidly, didn't they?

14 A John Calfee's argument is that --
15 that the advertising caused the -- the
16 decline.

17 Q During this same period of time
18 Mr. Calfee also noted that the competition
19 between the cigarette companies was intense
20 and that's the word he used, "intense," there
21 on page 40; is that correct?

22 A That is his argument, yes.

1 Q So that was from the 1958 period.
2 By near the end of 1959, the following year,
3 the FTC had reaffirmed its prohibition
4 against any kind of advertising claims that
5 might be construed to be either explicit or
6 implicit health claims, didn't it? I can
7 refer you to page 41 of Mr. Calfee's report.

8 A You said near the end of '59?

9 Q Near the end of '59 the FTC
10 reaffirmed its prohibition against any kind
11 of advertising claims that might be construed
12 to be either explicit or implicit health
13 claims; isn't that correct?

14 A According to Mr. Calfee.

15 Q Reading from Mr. Calfee's report
16 there on page 41 he said, "The FTC staff
17 reiterated its view that tar and nicotine
18 claims would be regarded as conveying the
19 additional claim that lower levels of tar and
20 nicotine reduced health risk." Do you see
21 that?

22 A Uh-huh, yes.

1 Q The last sentence on page 41 that
2 goes over to page 42, "The FTC stopped this
3 second Tar Derby despite the fact that the
4 tar and nicotine levels of cigarettes were
5 coming from an independent lab." Mr. Calfee
6 wrote, "The staff also indicated it would now
7 require scientific evidence that reduced tar
8 and nicotine provided significant health
9 benefits." Do you see where I read that?

10 A Uh-huh, yes.

11 Q Is that correct?

12 A That's what he says, yes.

13 Q In fact, the FTC's new standard was
14 stringent because it required evidence on the
15 long-term effects of a type of cigarette, low
16 tar that was still new; is that correct?

17 A Yes, that's what he says.

18 MS. PARKER: Let me show you now
19 Exhibit 15.

20 (Wilkenfeld Deposition Exhibit
21 No. 15 was marked for
22 identification.)

1 BY MS. PARKER:

2 Q Exhibit 15 is a letter from the
3 Federal Trade Commission to R.J. Reynolds;
4 isn't that correct?

5 A Well, it's not signed, so -- but I
6 assume it's a copy of a letter that may have
7 been sent.

8 Q The letter is dated December 17th
9 of 1959, correct?

10 A Again, that's in handwriting. The
11 rest of it is printed, so I can assume that
12 it's correct, but I have no evidence.

13 Q Let me bring your attention to the
14 first sentence of that letter. In this
15 letter to Reynolds isn't it true that the FTC
16 at that time back in 1959 stated that it
17 considered all representations of low or
18 reduced tar or nicotine, whether by
19 filtration or otherwise, to be health claims.
20 Do you see that sentence?

21 A I see the sentence. I don't know
22 whether this letter was sent.

1 Q Well, that's not my question. My
2 question is, isn't it true --

3 A That's what the first sentence
4 says, yes.

5 Q Isn't it also true that that was
6 the FTC's position in 1959? Isn't that
7 consistent with your understanding of the
8 historical events relating to the FTC's
9 involvement with tar and nicotine levels?

10 A It's very similar to what their
11 position was, yes.

12 MS. PARKER: Let me show you now
13 Exhibit 16.

14 (Wilkenfeld Deposition Exhibit
15 No. 16 was marked for
16 identification.)

17 BY MS. PARKER:

18 Q Exhibit 16 is a statement made by
19 Earl Kintner, the chairman of the Federal
20 Trade Commission, correct?

21 A It's a letter that Kintner sent
22 to -- it actually was a statement that he

1 made at the AFA.

2 Q He was the chairman of the Federal
3 Trade Commission at the time?

4 A Yes.

5 Q The FTC's position prohibiting tar
6 and nicotine claims was confirmed in this
7 statement in 1960, correct?

8 A Well, an agreement between the
9 chairman and the industry would not be a
10 commission position. It would be an
11 agreement worked out -- sort of a voluntary
12 informal agreement and this represents that.
13 It's not -- it's not legally binding.

14 Q Well, let me bring your attention
15 to the middle of that first full paragraph of
16 the chairman's statement. It says, "There
17 will be no more tar and nicotine claims in
18 cigarette advertising."

19 A Correct.

20 Q Do you see that?

21 A The industry agreed to that with
22 him.

1 Q Was that the FTC's position at that
2 time?

3 A It was certainly -- you know, I
4 know that this -- this letter -- that this
5 statement was made by Earl Kintner. It
6 certainly represented his position.

7 Q He was the head of the FTC?

8 A He was the chairman of the FTC and
9 I -- I know of no dissents that occurred at
10 this time, but, again, I was not at the
11 commission at this time.

12 Q Further on in Exhibit 16, in fact,
13 the FTC thanked the tobacco companies and
14 their lawyers. Do you see that?

15 A Actually Earl Kintner thanked
16 the -- see, the --

17 Q The chair of the FTC thanked the
18 tobacco companies and their lawyers; isn't
19 that correct?

20 A That's right.

21 Q Also the FTC said that this was a
22 landmark example of industry Government

1 cooperation in solving a pressing problem.
2 Do you see that?

3 A Yes.

4 Q Now early in 1960 didn't the Bureau
5 of Competition of the FTC negotiate an
6 industry-wide agreement to ban the tar and
7 nicotine claims? Is that the agreement
8 you're referencing?

9 A First of all, it would be Consumer
10 Protection not competition. The question
11 was -- what year?

12 Q Let me restate it then.

13 A Okay.

14 Q So in 1960 don't you agree that the
15 FTC negotiated an industry-wide agreement
16 that banned all tar and nicotine claims?

17 A I have no knowledge that they
18 negotiated anything. I -- I know that Earl
19 Kintner wrote -- made a statement that
20 indicated that he had the assurances of the
21 industry that they would not make these
22 claims.

1 Q Was it your understanding that
2 in 1960 there was a ban in effect that
3 prohibited tar and nicotine claims?

4 A No, a ban is a legally enforceable,
5 you know, regulation or -- or law. This was
6 not a -- this is not legally enforceable.

7 Q But there was an agreement?

8 A There was an agreement not to
9 advertise.

10 Q The agreement was between the head
11 of the FTC and tobacco companies; is that
12 correct?

13 A The chairman of the FTC cannot make
14 an agreement with the industry. The -- the
15 chairman of the FTC could use his good
16 offices to have that industry make a
17 statement as to how they're going to behave,
18 but I don't think this was -- I don't -- you
19 know, as far as I remember from reading the
20 history, I don't think this became a rule or
21 a -- or a case. This was a statement by the
22 chairman as to his understanding of what the

1 industry had said to him.

2 Q Have you ever heard of an
3 individual by the name of John P. Sullivan?

4 A No.

5 Q He was an attorney for the Federal
6 Trade Commission from 1948 until 1960. Does
7 that refresh your recollection?

8 A No, I don't know who he was.
9 (Wilkenfeld Deposition Exhibit
10 No. 17 was marked for
11 identification.)

12 BY MS. PARKER:

13 Q Let me show you, then, what we've
14 marked as Exhibit 17, which is an affidavit
15 from Mr. Sullivan.

16 MR. PATRICK: What's the number on
17 this one?

18 BY MS. PARKER:

19 Q 17. If you'll look on the first
20 page, it says he was employed as an attorney
21 for the Federal Trade Commission continuously
22 from September 1948 to February 1960 and then

1 over on the second page, first full
2 paragraph, last sentence, it says, "The
3 commission in December 1959 and January 1960
4 exacted an agreement from all cigarette
5 companies that they would omit from cigarette
6 advertising all references to health direct
7 or implied. The ban imposed by these
8 agreements was absolute in terms." Do you
9 see that?

10 A Yes.

11 Q Is that statement in Mr. Sullivan's
12 affidavit consistent with your knowledge of
13 the issue?

14 A No.

15 Q Do you disagree with Mr. Sullivan
16 if he was the --

17 A I think he used his terms loosely.

18 Q You haven't had a discussion with
19 Mr. Sullivan about that?

20 A No, no, and I can only -- and I can
21 only speak from my understanding of FTC law
22 from 1980 on, but --

1 Q Mr. Sullivan was the lawyer there
2 in 1960 when this was actually happening,
3 correct?

4 A That's correct. Well, I don't
5 know. Was he a lawyer? Did he say he was a
6 lawyer? He said he was an investigator.

7 Q If you look at the first page, it
8 says I was employed as an attorney.

9 A People use the term "ban" very
10 loosely. In order to -- in order to
11 effectuate a case an attorney would be
12 required to prove that the advertising
13 violated Section 5 and not the agreement
14 unless things changed dramatically from the
15 time I was there before. I don't think you
16 can go into court with an agreement or a
17 guide.

18 Q But in any event, at a minimum,
19 your testimony is that there was an agreement
20 in place between the head of the FTC and the
21 tobacco companies in 1960 and under that
22 agreement all tar and nicotine claims were

1 banned?

2 MR. PATRICK: I'm going to object
3 to the question.

4 THE WITNESS: Okay.

5 BY MS. PARKER:

6 Q Would you answer it, please?

7 A The -- again, I wasn't there
8 in 1960. I can only tell you from what I've
9 seen in the history books and in the
10 documents, but I have never seen and they may
11 exist, but I have never seen a commission
12 order or a rule that embodied that -- that
13 understanding that Earl Kintner had with the
14 industry.

15 The commission did a lot of things
16 in that way. I mean it was -- it -- it had a
17 lot of informal agreements with companies.
18 But unless the nature of guidelines or
19 agreements had changed dramatically, they had
20 no force and effect of law. They indicated
21 what the commission might do in the future
22 and, you know, if you were a smart company,

1 you would -- you'd go along with that. But
2 they did not have the force and effect of
3 law.

4 Q You aren't suggesting that back
5 in 1960 the chair of the FTC was not planning
6 to stand by his agreement with the tobacco
7 companies, are you?

8 A First of all, he could plan to
9 stand by them, but the attorney would still
10 have to prove the case. The agreement itself
11 would not be proof of a violation.

12 The violation would have to be
13 proved by the advertising having been found
14 to be deceptive under Section 5 of the
15 Federal Trade Commission Act, not for having
16 violated the agreement.

17 Q Well, let me ask you to look now at
18 Exhibit 18.

19 A Okay.

20 (Wilkenfeld Deposition Exhibit
21 No. 18 was marked for
22 identification.)

1 BY MS. PARKER:

2 Q This was a bill that was introduced
3 the House of Representatives in 1962,
4 correct? The date is on the first page.

5 A I presume it was introduced.

6 Q So despite this agreement between
7 the head of the FTC and the tobacco
8 companies, congress attempted to require
9 cigarettes that were sold in interstate
10 commerce to be packaged and marked to show
11 the tar and nicotine content, didn't it?

12 I'll bring your attention in
13 particular to page two, Section 3A of the
14 proposed legislation.

15 A This bill would have required it.

16 Q Would require the nicotine content
17 and the tar content of the total number of
18 cigarettes in the package?

19 A Right, yes.

20 Q Do you see that? If you look over
21 further on page three at the top, under this
22 proposed legislation that requirement would

1 have been enforced by the Federal Trade
2 Commission, correct?

3 A Uh-huh, yes.

4 Q Do you know whether the FTC
5 supported that bill?

6 A I have no idea.

7 Q So as of 1960, the FTC completely
8 prohibited by this agreement any reporting of
9 the tar and nicotine levels on cigarette
10 advertising, correct?

11 A I have to dispute the word
12 "prohibited." It was the position of the
13 chairman of the Federal Trade Commission
14 without what appears to have been very
15 little, if any, dissent from the rest of the
16 commissioners that the industry would not
17 report those numbers and that that would find
18 favor in the eyes of the Federal Trade
19 Commission, but it was not prohibited.

20 (Wilkenfeld Deposition Exhibit
21 No. 19 was marked for
22 identification.)

1 BY MS. PARKER:

2 Q Let me show you now Exhibit 19 and
3 ask you to confirm that in 1964 the tobacco
4 companies created a cigarette advertising
5 code as a guideline for cigarette ads,
6 correct?

7 A You know, this is one -- this is
8 one thing I have always had a great deal of
9 confusion on, and actually you mentioned John
10 Rupp earlier. I would regularly ask John
11 about the code, when it came into effect and
12 what -- what force and effect it had, when it
13 was changed. I never got a straight answer.
14 So I can only say that you've handed me
15 something that's called the cigarette
16 advertising code.

17 Q Do you have any reason to dispute
18 that the cigarette advertising code was
19 created in 1964?

20 A I have no reason to either believe
21 it or not believe it. There was a code when
22 I started working in '83.

1 Q Do you have any reason to dispute
2 that the companies, the tobacco companies,
3 submitted the cigarette advertising code to
4 the FTC?

5 A No, I have no evidence of that. I
6 never found it in the files.

7 Q Do you have any reason to dispute
8 it, that the company submitted it?

9 A Because I never found it in the
10 files, I guess I wouldn't feel comfortable
11 saying one way or the other. I mean -- the
12 fact that it wasn't in the files doesn't mean
13 it wasn't submitted, but the fact that I
14 didn't find it in the files wouldn't cause
15 me --

16 Q You just don't know one way or the
17 other?

18 A I have no way of knowing, yeah.

19 Q The FTC approved the cigarette
20 advertising code, correct?

21 A This (indicating)?

22 Q The FTC approved cigarette

1 advertising code, right?

2 A Not that I know of. I mean if they
3 did, again --

4 Q You don't know?

5 A I have -- they approved it in -- in
6 what fashion?

7 Q Let me ask you to look over on page
8 six at Section 4. Do you see that part? Do
9 you see where I am?

10 A Yes.

11 Q I'm going to read just the first
12 part of that and then go over to D,
13 subsection D, which is on page seven. It
14 states that, "No cigarette advertising shall
15 be used which refers to the removal or the
16 reduction of any ingredient in the mainstream
17 smoke of a cigarette except," and go over to
18 subsection D, "the quantity of such
19 ingredient is determined and expressed in
20 accordance with uniform standards adopted by
21 the administrator for measuring the quantity
22 of the ingredient present in the mainstream

1 smoke." Do you see that?

2 A Uh-huh, yes.

3 Q Do you have any reason to dispute
4 that what I just read is the provision of the
5 code that relates to disclosures of tar and
6 nicotine in 1964?

7 A I have no way of knowing.

8 Q Do you have any reason to dispute
9 that in 1964 the tobacco companies were still
10 not disclosing, refraining from disclosing
11 tar and nicotine levels in the cigarette
12 advertisements?

13 A In 1964 they were or were not. I
14 don't know.

15 Q You don't know?

16 A I don't know.

17 (Wilkenfeld Deposition Exhibit
18 No. 20 was marked for
19 identification.)

20 BY MS. PARKER:

21 Q Let's move a couple of years
22 from 1964 to 1966 and show you what we've

1 marked as Exhibit 20, which is a press
2 release from the FTC dated March 25th, 1966.
3 Do you see that date up at the top?

4 A March -- yes.

5 Q March 25th, 1966. This is
6 consistent with your experience with FTC,
7 that they would issue press releases from
8 time to time to the public?

9 A Yes.

10 Q About middle way down this press
11 release, let me read this to you. It says,
12 "On the basis of the facts now available to
13 it the commission has determined that a
14 factual statement of the tar and nicotine
15 content expressed in milligrams of the
16 mainstream smoke from a cigarette would not
17 be in violation of such guides or of any of
18 the provisions of law administered by the
19 commission." Do you see that?

20 A Yes.

21 Q Did I read it correctly?

22 A Yes.

1 Q So would you agree with me that as
2 of March 1966, the FTC had reversed its
3 course and now tar and nicotine disclosures
4 were permitted on cigarette advertisements?

5 A Consistent with the rest of the --
6 the rest of the statement about collateral
7 representations and the Cambridge filter
8 method.

9 Q But the FTC still prohibited any
10 implied or express representations as to
11 reduced health hazards presented by a
12 cigarette; isn't that correct?

13 A Yes.

14 Q It's true, is it not, that the
15 effect of this ban was to remove the
16 incentive to create and bring to market
17 lower-yield tar and nicotine cigarettes.
18 Would you agree with that?

19 A There were too many clauses.

20 Q It's true is it not, that the
21 effect of the ban was --

22 A Which ban? The one that this --

1 Q You had just agreed with me that
2 the FTC prohibited any implied or express
3 representations as to reduced health hazard
4 presented by a cigarette. You agreed with
5 that?

6 A I said that -- that this statement
7 said that they could make tar/nicotine
8 disclosures as long as there were no
9 collateral representations about health
10 hazards. But, again, it's a statement. It's
11 not law.

12 Q Well, you agree that the FTC
13 prohibited any implied or express
14 representations as to reduced health hazards
15 presented by any cigarette. I've already
16 asked you that question and you said yes.
17 That's the ban I'm referring to.

18 A Again, I have to dispute the term
19 "ban," but it is their statement.

20 Q So here's my follow-up question.
21 It is true, is it not, that the effect of
22 that what I'm calling ban was to remove the

1 incentive to create and bring to market
2 lower-yield tar and nicotine cigarettes?

3 MR. PATRICK: I'm going to object
4 of course.

5 THE WITNESS: I'm going to probably
6 have to say that without looking at the FTC
7 tar/nicotine, you know, I don't think I can
8 agree with it.

9 BY MS. PARKER:

10 Q Let me ask you to look back to the
11 Calfee report that we marked as Exhibit 3.
12 If you would look at page 49 of that report,
13 please, and see if this will refresh your
14 recollection. Page 49 of Mr. Calfee's report
15 references an article in Reader's Digest,
16 does it not?

17 A We're talking about 1966, right?

18 Q That's correct.

19 A The -- and the article -- are you
20 talking about footnote 178?

21 Q Yes, in 1963.

22 A That was 1963.

1 Q Right.

2 A This was three years later. You're
3 asking me if the -- if what the commission
4 did in 1966 halted the decline in tar and
5 nicotine?

6 Q I'm asking you if what the
7 commission did in 1966, if the effect of that
8 action was to remove the incentive to create
9 and bring to market lower-yield tar and
10 nicotine in cigarettes.

11 A Nothing on this page would seem to
12 address that.

13 Q Nothing refreshes your recollection
14 there?

15 A Well, I don't see anything on this
16 page that talks to that period. This page 49
17 talks about the period up until about 1963,
18 not the period following 1986.

19 Q Let me ask you, then, about
20 the 1963 article here that relates to
21 the 1960 ban.

22 A Okay.

1 Q Do you agree with that?
2 A Well, okay, with the caveat on ban.
3 Q Uh-huh. If you would read that
4 second paragraph in the quote there. Let me
5 read it and then ask you if you'll agree if I
6 read it correctly.
7 A
8 Q "The reason for this is the FTC
9 blackout of facts and figures in cigarette
10 advertising in 1961. Since no claims of
11 superior or improved filtration can be made
12 cigarette manufacturers have quit trying to
13 produce safer cigarettes lower in tar and
14 nicotine.
15 "Between 1957 and 1960 such
16 competition reduced the tars in American
17 cigarette smoke by 60 percent. When the Tar
18 Derby ended, so did research for safer
19 cigarettes." Did I read that correctly?
20 A You read that correctly.
21 Q Do you agree with that statement?
22 A I agree that that's definitely what

1 Reader's Digest said.

2 Q Well, do you recall agree with the
3 content of the statement?

4 A Would I agree with the content of
5 the statement. You know, this is --

6 MR. PATRICK: I'm going to object.

7 THE WITNESS: You know, I can agree
8 that that was -- that was what they said at
9 the time as a consequence of the commission's
10 action.

11 BY MS. PARKER:

12 Q Are you familiar with Senator
13 Maureen Neuberger?

14 A Yes.

15 Q She was a leading congressional
16 crusader against smoking. Would that be an
17 accurate characterization?

18 A She was one of the first.

19 Q Crusader against smoking?

20 A "Crusader" is such a -- a loaded
21 term. I would say she was -- she had an
22 uncommonly forward-looking opinion of how to

1 protect the public health.

2 Q Look at page 49, please, ma'am, of
3 the Calfee report. You have it right in
4 front of you?

5 A Yes.

6 Q I want to bring your attention to
7 footnote 179 at the bottom of the page. Do
8 you see that footnote?

9 A Ah, they say crusader. Well, he
10 says crusader.

11 Q Mr. Calfee called her a crusader?

12 A Yes, right.

13 Q This report references a book
14 written by Senator Neuberger in 1963,
15 correct?

16 A Uh-huh.

17 Q In that book Senator Neuberger
18 blamed the FTC's ban on reporting
19 tar/nicotine levels in cigarettes
20 advertisements for destroying the incentive
21 to create lower tar/nicotine products,
22 correct?

1 A Correct.

2 Q Let me read this quote from the
3 book. "The unhappy result of the 1960 ban
4 was that sales of nonfilter cigarettes
5 actually stopped declining." Then down
6 further, "Perhaps worse, there was much less
7 incentive for the cigarette manufacturer to
8 commit great sums of money toward the
9 development of more efficient or selective
10 filters since he had little promise of being
11 able commercially to exploit his
12 development." Did I read that correctly?

13 A You did indeed.

14 MS. PARKER: I have a note here
15 that we need to change the tape on the
16 videotape, so if we could take just a
17 couple-minute break.

18 THE VIDEOGRAPHER: 2:11 p.m. off
19 the record.

20 (Recess)

21 THE VIDEOGRAPHER: 2:21 p.m. back
22 on the record.

1 BY MS. PARKER:

2 Q Before we took our break we had
3 talked about the Reader's Digest article. Do
4 you recall that those questions?

5 A You went on to Maureen Neuberger.

6 Q Yes, that's right.

7 Now, with respect to the Reader's
8 Digest article I wrote down that you said
9 that was what they said at the time was a
10 consequence.

11 A Uh-huh, yes.

12 Q Who is they?

13 A Reader's Digest.

14 Q There are others besides Reader's
15 Digest who agreed with that statement?

16 A Yes.

17 Q Who?

18 A Well, apparently Maureen Neuberger.

19 Q Who else?

20 A You know, I don't know the others
21 that did, but it was -- it's considered
22 wisdom from that period.

1 Q Including the wisdom of the
2 scientific community?

3 A I don't know.

4 Q Do you have any reason to
5 dispute --

6 A I have no reason to agree or
7 disagree.

8 Q Then you said at that time. What
9 did you mean by at the time?

10 A Oh, that these statements --

11 Q You said that's what they said at
12 the time.

13 A Right. These statements are
14 contemporaneous with the events. That's all
15 I meant by it. Nothing more, nothing less.

16 Q You and I had some discussions
17 about whether the right term is ban or
18 agreement?

19 A Correct.

20 Q With respect to that discussion you
21 said if you were a smart company, you would
22 go along with the agreement. Do you remember

1 saying that?

2 A Guidelines indicate the actions
3 that the Federal Commission has announced it
4 will take under certain circumstances.

5 Q So if you were are a smart company,
6 you would go along with those guidelines?

7 A Right. But a lawyer for the
8 Federal Trade Commission who wants to bring a
9 case that you might say flows out of the
10 guidelines would not be able to bring the
11 guidelines in as evidence of either law or
12 fact. They would have to prove that the
13 actions of the company violated Section 5 of
14 the Federal Trade Commission Act, not the
15 guidelines.

16 Q But if you were a smart company,
17 you would go along with that agreement,
18 right? That's what you said?

19 A Yes. That's the purpose of
20 guidelines.

21 Q So you're saying that although the
22 tobacco companies were not obligated to

1 follow the agreement, they would be well
2 advised to follow the wishes of the FTC in
3 this regard; is that correct?

4 A Well, that's what we would have
5 said at the FTC, yes.

6 Q If they did not, if the companies
7 did not, they did so at the risk of an FTC
8 lawsuit; is that correct?

9 A Yes. Not a hundred percent surety,
10 but that would be -- that would be an
11 outcome.

12 Q Do you have any reason to believe
13 that anyone at the FTC that was involved in
14 this agreement was co-opted by the tobacco
15 companies?

16 A I have no way of knowing.

17 Q Do you have any reason to believe
18 that?

19 A I have no reason to believe it or,
20 as I say, I have no information on that
21 subject.

22 Q Are you related to the chair of the

1 FTC at that time?

2 A Related?

3 Q Yes.

4 A No, no. He was a law partner of my
5 fathers.

6 Q Law partner of your father's.
7 He was an honorable man?

8 A Earl Kintner, yes. What?

9 MR. WILLIAMS: I'm sorry.

10 BY MS. PARKER:

11 Q You wouldn't consider him to be
12 someone who would be co-opted by anyone; is
13 that correct?

14 A I have no reason to question
15 this -- this guideline as having been arrived
16 at honorably. I -- I would never say that a
17 political animal couldn't be swayed one way
18 or the other and -- and Earl Kintner, when he
19 was chairman of the Federal Trade Commission,
20 had a political appointment. But I have no
21 reason to believe that the agreement reached
22 was not reached in the utmost of good faith.

1 Q Have you ever heard anything to the
2 contrary?

3 A No.

4 Q Discussing this 1966 period here
5 where there was a ban or an agreement we've
6 talked about. The tar/nicotine levels in the
7 cigarettes --

8 A Are you talking about prior to '66
9 or after '66?

10 Q Let me ask you now about 1966.

11 A Okay.

12 Q The tar and nicotine levels in
13 cigarettes actually rose beginning in 1966
14 during this period, correct?

15 A I don't know.

16 Q You don't know one way or the
17 other?

18 A I don't know one way or the other.
19 Again, whether they rose or fell, it would
20 have to be normalized to whatever the test
21 methodology was.

22 In '66-67 the commission started

1 using the Ogg method or the Cambridge filter
2 method. From that time forward we can be
3 fairly confident that, at least as a machine
4 method, the numbers are comparable as far as
5 the machine measurement.

6 Numbers produced before then,
7 whenever we've talked in publications about
8 numbers produced before then, if they were
9 published by others, we always caveated it
10 with this may or may not have been a
11 comparable procedure.

12 (Wilkenfeld Deposition Exhibit
13 No. 21 was marked for
14 identification.)

15 BY MS. PARKER:

16 Q Let me show you now what we've
17 marked as Exhibit 21 and that's a letter on
18 the stationery of the Federal Trade
19 Commission from the Federal Trade Commission
20 dated April 11th, 1966, correct?

21 A Correct.

22 Q That's a letter to Robert Minor; is

1 that correct?

2 A Uh-huh, yes.

3 Q Have you heard of him before?

4 A No.

5 Q Do you know his relationship to the
6 FTC?

7 A No.

8 Q Let me bring your attention in
9 particular over to page four, the top of page
10 four of the letter. This period of time
11 there, 1966, members of the public health
12 community such as the American Cancer Society
13 had pressed the Federal Trade Commission to
14 lift the prohibition on tar and nicotine
15 disclosures; isn't that correct?

16 A Yes.

17 Q In this particular letter that's
18 marked there as Exhibit 21, the American
19 Cancer Society stated, and this is, again,
20 repeated by the FTC, "We are convinced,
21 therefore, that it would be in the public
22 interest to let people know how much tar and

1 nicotine they are taking in to their bodies
2 when they smoke cigarettes.

3 The customer is given this
4 information concerning the drugs which he
5 takes, the food which he eats, the beverages
6 which he drinks. Why not concerning the
7 cigarette smoke he inhales? Certainly there
8 is no reason to think it would be against the
9 public interest to provide this information."
10 Did I read that correctly?

11 A Yes, you did.

12 Q In addition, the Royal College of
13 Surgeons in England had advocated government
14 publication of tar and nicotine content
15 previously, hadn't they? I'm not asking a
16 question about the exhibit right now.

17 A Okay.

18 Q Were you aware of that?

19 A I'm not aware of that, but --

20 Q Let me ask you to look at the
21 Calfee report again.

22 A Yeah, page 49.

1 Q Page 46 actually there's a
2 reference at note 165. It says, "In 1962
3 came the well-publicized report from the
4 Royal College of Surgeons in England. It
5 recommended low-tar cigarettes for those who
6 could not quit and suggested government
7 testing and publication of tar and nicotine
8 content." Did I read that correctly?

9 A Yes.

10 Q That's from 1962?

11 A Correct.

12 Q It was around that same period of
13 time that Senator Neuberger had encouraged
14 the FTC to lift the ban?

15 A Yes.

16 MS. PARKER: Let me show you now
17 Exhibit 22.

18 (Wilkenfeld Deposition Exhibit
19 No. 22 was marked for
20 identification.)

21 BY MS. PARKER:

22 Q That's a letter, again, on the

1 Federal Trade Commission stationery, correct?
2 That's what it says at the top of the first
3 page, isn't it?

4 A Yes, yes, yes. I'm sorry.

5 Q The letter is dated
6 April 11th, 1966, correct?

7 A Correct.

8 Q It's from the Federal Trade
9 Commission to congress, to the chairman of
10 the commerce committee, correct?

11 A Well, yeah, this is by direction of
12 the commission and I presume that it was
13 signed.

14 Q Let me bring your attention to the
15 top of page eight. There's a quote there
16 that comes from the National Interagency
17 Council on Smoking and Health. Do you see
18 that quote? Very top of page eight?

19 A Uh-huh.

20 Q It says, "The national Interagency
21 Council on Smoking and Health hopes that you
22 will take the steps necessary to make it

1 permissible for cigarette manufacturers to
2 list tar and nicotine content on the labels
3 of cigarette packages." Did I read that
4 correctly?

5 A You did.

6 Q According to Mr. Calfee the FTC
7 finally lifted the ban so that it would
8 encourage the development and use of low
9 yield tar and nicotine cigarettes because
10 that was thought to be beneficial in terms of
11 public health policy at the time, correct?

12 A In regards to that on page two --

13 Q Page two of?

14 A This letter. Says -- this is what
15 I've been trying to say, "These actions" --
16 they're talking about the 1960 agreement.

17 Q Right.

18 A "These actions constitute, in
19 effect, informal advice and guidance to
20 industry with respect to the regulatory
21 posture which the commission had reason to
22 believe would be established as a basis for

1 issuance of complaints in subsequent
2 proceedings." That describes the action that
3 the commission was taking during the period
4 of the '50s. None of them were illegal
5 actions. All of them constituted, in effect,
6 informal advice and guidance.

7 Q In that same paragraph that you're
8 reading from, look at the next sentence
9 there. It says, "They were based upon
10 reports from the staff detailing the
11 testimony which might be expected from the
12 leading experts knowledgeable on the subject
13 as had been developed during the course of
14 conversations and correspondence with those
15 experts." Did I read that correctly?

16 A Yes.

17 Q So according to Calfee the FTC
18 finally lifted the ban so that the lifting of
19 the ban or agreement, whatever you want to
20 call it?

21 A They changed the posture that they
22 would take on a legal situation.

1 Q They did that in order to encourage
2 the development and use of low yield tar and
3 nicotine cigarettes because it was thought to
4 be beneficial to public policy at the time
5 and that's on Calfee page 54 and 55; is that
6 correct?

7 A They were responding to concerns
8 expressed by the public health community that
9 the failure to have this advertising was not
10 allowing the development of law-tar products,
11 which some believed would be beneficial.

12 Q So the members of the public health
13 community thought it would lead to cigarette
14 innovation and lower tar and nicotine
15 cigarettes, correct?

16 A Again, historically that's what
17 they have said, yeah. They thought it would
18 lead to real reductions in tar and nicotine
19 and real health benefits.

20 Q These groups recommended that
21 smokers use lower tar and nicotine products,
22 didn't they?

1 A You know, I've tried to trace that
2 history recently.

3 Q Let me ask you to look at page 46
4 of Mr. Calfee's report, in particular
5 footnote 165.

6 A Yeah, I -- you don't have the
7 Surgeon's General report from that period, do
8 you -- that's what I've always looked for --
9 to see what exactly they said?

10 Q We actually do have it.

11 A Which one? '64 or --

12 Q I have all of them.

13 A You know, what they said was that
14 based upon the experiments that they have
15 done, that clearly the application of more
16 tar was worse than less and, therefore,
17 exposure to less tar should be beneficial.

18 Q Let me bring your attention to
19 page 54 of the Calfee report. The first full
20 paragraph there, do you see that? It says,
21 "By 1966 the American Cancer Society, the
22 Public Health Service and other public health

1 figures were recommending that smokers switch
2 to lower tar cigarettes even though there
3 still was no epidemiological evidence that
4 doing so was likely to reduce risk."

5 A But my --

6 Q Let me finish. "Most of the same
7 authorities also wished to see advertising of
8 tar and nicotine levels as a means for
9 encouraging development of better
10 cigarettes." Did I read that correctly?

11 A Yes.

12 Q We have marked previously
13 Exhibit 22, if you could look at that
14 Exhibit 22, which is the letter from the
15 Federal Trade Commission to the chairman of
16 the commerce committee in the senate
17 dated 1966. Do you see that?

18 A What page? I'm sorry.

19 Q Page four of the exhibit. Toward
20 the bottom page, the last full paragraph that
21 begins on that page, the second sentence, it
22 says, "There was substantial support for the

1 proposition that an accurate statement of tar
2 and nicotine content would be in the public
3 interest." Do you see that?

4 A Yes.

5 Q Did I read that correctly?

6 A Yes.

7 (Wilkenfeld Deposition Exhibit
8 No. 23 was marked for
9 identification.)

10 BY MS. PARKER:

11 Q Now, let me show you Exhibit 23
12 that we've marked. This is testimony from
13 Chairman Daniel Oliver, who was at the time
14 the chair of the FTC. Do you know his name?

15 A Daniel Oliver?

16 Q Yes.

17 A Yes.

18 Q You're familiar with him?

19 A Yes, I was working there at the
20 time.

21 Q This is his testimony before
22 congress. I'm going to ask you to look at

1 page 109, which is actually the second page
2 of what I handed you. If you look over in
3 the second column --
4 A The epilogue? Which column?
5 Q The second column.
6 A On 109?
7 Q Yes.
8 A Yeah.
9 Q The second full paragraph, yes.
10 A That begins the epilogue.
11 Q You're correct, yes. So the
12 chairman of the FTC testified before congress
13 that the FTC had erroneously decided to ban
14 advertising containing tar and nicotine
15 levels in the early '60s; isn't that correct?
16 A That is indeed his testimony.
17 Q Now, as a result of this change in
18 policy, in 1966 the FTC announced that it
19 would test cigarettes for tar and nicotine
20 content, correct?
21 A Yes.
22 Q The FTC held public hearings on tar

1 and nicotine determination methods; isn't
2 that correct? Do you know?

3 A I don't know.
4 (Wilkenfeld Deposition Exhibit
5 No. 24 was marked for
6 identification.)

7 BY MS. PARKER:

8 Q Let me show you what we've marked
9 as Exhibit 24. That is a press release from
10 the Federal Trade Commission, correct?

11 A So apparently they did have public
12 hearings.

13 Q It was dated August 1st, 1967?

14 A Correct.

15 Q Do you see at the top of the first
16 page?

17 A Yes.

18 Q They did have public hearings there
19 on the tar and nicotine determination
20 methods, correct?

21 A Correct.

22 Q Now, the FTC set up its own tar and

1 nicotine testing lab in 1967, correct?

2 A Yes.

3 Q The FTC used the Cambridge filter
4 method in its testing, correct?

5 A Yes, uh-huh.

6 Q This method, the Cambridge filter
7 method, was based on a testing method that
8 had been developed by the American Tobacco
9 Company; is that correct?

10 A You know, I am not aware of who
11 developed it. I know that it was not
12 developed by the Federal Trade Commission,
13 that it was modified from a tobacco company's
14 testing procedure.

15 Q Do you have any reason to dispute
16 that it was --

17 A No, I have no reason to dispute
18 that.

19 Q Let me ask my question for the
20 record.

21 MR. PATRICK: I'm sorry. Yeah, go
22 ahead and ask it.

1 BY MS. PARKER:

2 Q Do you have any reason to dispute
3 that the FTC method was based on a testing
4 method developed by the American Tobacco
5 Company?

6 A I have no reason to dispute it. I
7 know it was -- it was developed by a man
8 named Ogg.

9 Q Do you know the names of the
10 scientists who worked on refining that test
11 method?

12 A At the FTC or elsewhere?

13 Q At any place.

14 A You know, the chemist at FTC was --
15 was Harold Pillsbury. He was the only one
16 and chemist we -- I mean lab director we ever
17 had. As to those who might have testified
18 in 1966 or who worked on it, no, I have no --
19 no personal knowledge of who they -- they
20 were.

21 Q You testified early this morning
22 that you are familiar with Dr. Ferrone.

1 A No, actually what I said was I
2 wasn't familiar with Dr. Ferrone.
3 Q You were not?
4 A Right.
5 Q You've heard the name?
6 A I've heard the name, but that's
7 about it.
8 Q So you never met him, but you know
9 who I'm talking about?
10 A Yeah, but I have very little
11 knowledge as what he has said or what he has
12 done.
13 Q Did you know that his wife was one
14 of the scientists who worked on refining that
15 test method?
16 A No, I didn't know that. Is that
17 true?
18 Q That's what he says.
19 A That's what he says. If that's
20 what he says, I don't --
21 Q Do you have any reason to dispute
22 that the scientists who worked on the test

1 method were high-quality researchers?

2 A I have no knowledge one way or the
3 other.

4 Q You have no reason to dispute that
5 they were high quality researchers sitting
6 here today, correct?

7 A If by that do you mean do I have
8 any knowledge whatsoever, I have no knowledge
9 whatsoever, so I have no knowledge to dispute
10 or affirm.

11 Q The scientists spent a lot of time
12 and effort into designing the method that the
13 FTC ultimately adopted, correct?

14 A You know, there was politics and
15 science and which was politics and which was
16 science I don't know. I know the FTC adopted
17 the method that they thought would be the
18 most appropriate.

19 Q Based on what the scientists told
20 them, correct?

21 A Correct. The FTC has very little
22 independent ability to be able to make

1 determinations on its own. It relies upon
2 expert advice of the review of other people's
3 work.

4 Q The method was not created to
5 deceive, correct?

6 A Oh, I don't want to comment on
7 that.

8 Q No, I'm asking your opinion.

9 A My opinion? That it was not
10 created to deceive?

11 Q Yeah. Do you agree with me that
12 the FTC testing method was not created for
13 the purpose of deceiving?

14 MR. PATRICK: I'm going to object
15 to the question, but you can answer.

16 THE WITNESS: I can't -- well, I
17 wish I could answer the question. 1966. I'd
18 have to go back and look at the documents
19 that I -- to see what year. The company
20 certainly knew that the delivery that people
21 were getting was not the same as the delivery
22 on the -- was not created to deceive.

1 BY MS. PARKER:

2 Q This is the Government testing
3 method I'm asking you about.

4 A Yeah, but --

5 Q The FTC testing method.

6 A The Government did not adopt this
7 procedure because it thought it was
8 deceptive. The Government adopted the
9 procedure because it thought it would be very
10 useful to consumers. So --

11 Q The Government thought it was
12 worthwhile?

13 A The Government definitely thought
14 it was worthwhile. If you're talking about
15 from the Government's perspective --

16 Q Yes.

17 A From the Government's perspective,
18 they believed that this would be useful
19 information to consumers.

20 Q Sitting here today you have no
21 reason to think anyone else thought anything
22 to the contrary, that it was going to be

1 worthwhile and that it was not deceptive?

2 A Well, I thought the companies at
3 the time even then said that they thought --
4 that they disputed -- I'd have to go back and
5 look at the public record, but I thought that
6 the companies were always on record as having
7 said they didn't think low tar had any
8 benefit, so I'm not sure I could categorize
9 what the companies thought.

10 Q You just don't know one way or the
11 other?

12 A As I say, I'm pretty sure that
13 things I have read in the past have indicated
14 that the companies were on public record as
15 having said that low tar is not better than
16 high tar.

17 I mean part of that was because
18 companies didn't think that there was any
19 health risks associated with smoking. But if
20 I remember correctly, that -- I'd have to
21 see -- I'd have to see some more
22 contemporaneous documents, but my

1 recollection is that they did not believe
2 that this would be a net consumer benefit,
3 the companies.

4 Q I'm going to move to strike that
5 answer. Here's my question. Here's what I
6 would like for you to answer: Do you have any
7 information, do you have any reason to
8 believe sitting here today that the test
9 method that was adopted by the FTC was
10 created for the purpose of deception?

11 MR. PATRICK: Objection.

12 THE WITNESS: I can give you a
13 multipart answer. The Federal Trade
14 Commission did not start testing using the
15 Cambridge filter method because it thought it
16 would be deceptive. The Federal Trade
17 Commission definitely believed that it would
18 provide useful information to consumers.

19 The companies certainly not long
20 after, and I don't remember at that time,
21 indicated that they did not believe that the
22 test method would give information that would

1 be a benefit. So whether that's deception or
2 not I don't know.

3 BY MS. PARKER:

4 Q Please explain to me how in the
5 world could it be deceptive.

6 A How in the world could it be
7 deceptive? If -- if, as the company stated
8 at the time, they did not believe that lower
9 tar was safer than higher tar, then a test
10 method that would -- would be created to --
11 to rank order cigarettes would be deceptive.
12 But, again, the Federal Trade Commission
13 believed it would be useful and that's --
14 that's what I can speak to more -- more
15 positively. I would like to go -- I mean --

16 Q The Federal Trade Commission's
17 belief that it would be helpful and
18 worthwhile and not deceptive was based on
19 what the public health community and the
20 scientists were saying at the time?

21 A Yes.

22 Q Correct?

1 A Correct.

2 Q Now, isn't it true that Reynolds
3 and Reynolds' competitors cooperated
4 extensively with the FTC in setting up the
5 tar and nicotine testing lab?

6 A I don't know if they -- what they
7 did with the lab, but I know that they
8 cooperated in the formulation of all this,
9 the procedure, the process. As far -- far as
10 setting up of the lab itself, you know, I
11 don't know when the antideficiency law came
12 into effect, so I don't know what they could
13 have accepted or not accepted from the
14 companies. I know that they -- all of the
15 technical advice would have come from them,
16 but -- do you mean more than that?

17 Q Well, my question is, won't you
18 agree that Reynolds and Reynolds' competitors
19 cooperated with the FTC in setting up the
20 testing procedure for tar and nicotine?

21 A Yes.

22 Q The FTC has acknowledged that it

1 approved the current rating system, correct?
2 You don't dispute that?

3 A That it what?

4 Q You don't dispute that the FTC has
5 acknowledged that it, the FTC, approved the
6 current rating system?

7 A Well, okay. Let me give you a
8 legal answer again. The Federal Trade
9 Commission had started a trade regulation
10 rule which would have required the disclosure
11 of the tar and nicotine ratings and
12 advertising on packaging. At the -- when the
13 companies said that they would voluntarily
14 disclose these numbers, the Federal Trade
15 Commission eventually -- I think that the
16 trade regulation law actually went into
17 effect and then they abandoned it or they
18 abandoned it prior to it becoming a final.

19 The agreement that the cigarette
20 companies reached was never signed by the
21 FTC. It's not that kind of agreement. It's
22 a voluntary agreement which has no force and

1 effect of law. But it is something that the
2 commission has done yearly ever since.

3 Q Well, the question that I asked you
4 was that the FTC had acknowledged that it has
5 approved the current rating system and you
6 gave me that long answer.

7 A Right.

8 Q Let me ask you to look at this
9 letter from the chairman of the FTC
10 dated 1994 to the National Cancer Institute
11 and if you look at the very first paragraph,
12 it says, "Pursuant to a methodology approved
13 by the Federal Trade Commission." Do you see
14 that?

15 A The methodology, yes.

16 Q So let me ask my question again.
17 You don't dispute, do you, that the FTC
18 approved the methodology used for testing tar
19 and nicotine?

20 A No, I don't dispute that.

21 Q Now, in 1967 the FTC went one step
22 further and began to require that any

1 disclosure of tar and nicotine information be
2 made pursuant to the FTC test method,
3 correct?

4 A What are you referring to?

5 Q Starting in 1967 the FTC required
6 or began to require that any disclosure of
7 tar and nicotine information would be made
8 pursuant to the FTC test method?

9 A That was my earlier answer, which
10 was that they -- they commenced a trade
11 regulation rule that would have required the
12 disclosure of tar nicotine ratings in
13 advertising and on packaging.

14 Q Pursuant to the FTC test method?

15 A Right, but that never went into
16 effect. Pursuant to a 1970 voluntary
17 agreement among most of the major cigarette
18 companies every cigarette advertisement
19 disseminated contains the disclosure. The
20 agreement is among the companies, and
21 actually American Brands was not a member of
22 that agreement.

1 That agreement was not an agreement
2 between the companies and the Federal Trade
3 Commission. It was an agreement among the
4 companies. The letter was sent to the
5 Federal Trade Commission. The Federal Trade
6 Commission abandoned its -- its trade
7 regulation rule and from ever after the
8 agreement amongst the companies said that as
9 long as the FTC continued to test twice
10 yearly, the companies would put the
11 disclosures in ads according to a certain
12 type of disclosure format.

13 Q The numbers, the tar nicotine
14 numbers that were going to be disclosed, had
15 to be pursuant to the FTC test method,
16 correct?

17 A They had to either be those that
18 were in the most recent FTC tests or arrived
19 at by the companies using the FTC method if
20 it was not in the last report.

21 Q So any disclosure of tar and
22 nicotine information had to be made using the

1 FTC test method, correct?
2 A According to the agreement reached
3 by the companies amongst themselves.
4 Q Correct?
5 A Correct.
6 Q Now, the FTC had its own testing
7 lab for many years, correct?
8 A Many.
9 Q All the reported tar/nicotine
10 numbers came from the FTC's own testing
11 laboratory during that period of time,
12 correct?
13 A You mean all the numbers that
14 were -- well, all the numbers that were
15 published by the FTC came from the FTC lab.
16 Q From their own testing lab?
17 A Right. But not all of the numbers
18 used in advertising came from the FTC lab.
19 Q Those came from the FTC testing
20 methodology though, correct?
21 A Right.
22 Q Manufacturers had to ensure that

1 the products that they were selling, the
2 products that were actually marketed,
3 reflected the FTC values, correct?

4 A The FTC numbers resulted from
5 testing two cigarettes each from 50 -- from
6 a 50 market pickup. So two packages each
7 from a 50 market pickup, a hundred packages,
8 took the cigarettes so that the number would
9 reflect a geographical distribution in the
10 United States. I don't think that there was
11 a guarantee that that reflected anything
12 other than the 50 market pickup. So I'm not
13 sure what you're asking me.

14 Q So if a tar number for a cigarette
15 that was obtained by the FTC in its own
16 testing lab was X. The tar number is X.
17 Doesn't that mean that the manufacturers had
18 to ensure that the cigarettes they sold for
19 that brand had the tar level of X?

20 A My understanding, if I -- if I
21 remember correctly, and I would have to go
22 back and look at the agreement, I think that

1 they agreed that if it were more than a
2 certain percentage away from that number,
3 that they would either inform the FTC or --
4 or get a new number.

5 Q So within that range, that
6 percentage that you're talking about within
7 that percentage, the actual cigarette sold by
8 the companies had to have tar and nicotine
9 numbers that were the same as the tar and
10 nicotine numbers that the FTC had obtained in
11 their testing laboratory, correct?

12 A Had to?

13 Q Yes.

14 A I mean that was the agreement that
15 they had entered into.

16 Q Under the agreement that's what was
17 required, correct?

18 A That was what they obligated
19 themselves to do.

20 Q Now, the FTC method is a
21 standard --

22 A Except it was supposed to be tested

1 twice a year, so it understood the notion
2 of -- of cigarettes constantly changing. So
3 there was supposed to have been a twice
4 yearly pickup, twice yearly testing, twice
5 yearly report.

6 Q Now, the FTC method is a
7 standardized methods that was adopted to
8 allow for comparisons, correct?

9 A Yes.

10 Q Isn't it true that no standardized
11 method will measure the way an individual
12 smokes?

13 A Correct.

14 Q The FTC method was not intended to
15 measure what an average smoker would get,
16 correct?

17 A Not intended to measure what an
18 average smoker would get. It's supposed to
19 be reflective of not -- average smoker. I
20 don't think that there was an indication that
21 it was supposed to be the mythological
22 average smoker. It was supposed to be the

1 amount delivered under certain prescribed
2 circumstances and the same circumstances for
3 all cigarettes so they would be comparable.

4 Q Let me ask you to take a look back
5 at what we've marked previously as
6 Exhibit 24, which is an FTC news release
7 from 1967. Do you see that?

8 A Yeah.

9 Q Let me bring your attention to the
10 first page down toward the bottom. It says,
11 "No test can precisely duplicate conditions
12 of actual human smoking and within fairly
13 wide limits no one method can be said to be
14 either right or wrong." Do you see that?

15 A Yes.

16 Q That was the FTC's own press
17 release from 1967 about the cigarette testing
18 method, correct?

19 A Correct.

20 Q Let me bring your attention over on
21 the second page of the second full paragraph,
22 continuing what the FTC itself said about its

1 testing laboratory. "No two human smokers
2 smoke in the same way. No individual smoker
3 always smokes in the same fashion. The speed
4 at which one smokes varies both among smokers
5 and usually also various with the same
6 individual under different circumstances even
7 within the same day. Some take long puffs or
8 draws, some take short puffs. That variation
9 affects the tar and nicotine quantity in the
10 smoke generated." Did I read that correctly?

11 A Yes, you did.

12 Q In fact, this press release is
13 dated 1967, three years earlier, in 1964, in
14 the Surgeon General's report the Surgeon
15 General acknowledged that a smoker can
16 receive different amounts of nicotine
17 depending on a number of factors, including
18 depth of inhalation, alkalinity or acidity of
19 the smoke, et cetera"; isn't that correct?

20 A If you could point me to the place
21 in the Surgeon's General report, I'd be happy
22 to agree with you.

1 Q You're not familiar with the
2 Surgeon's General report in 1964?

3 A I don't have it all memorized.

4 MS. PARKER: Let me show you just a
5 few pages from the report. I have the whole
6 thing though if you need it.

7 (Wilkenfeld Deposition Exhibit
8 No. 26 was marked for
9 identification.)

10 BY MS. PARKER:

11 Q We marked that as Exhibit 26. If
12 you will look at the first full paragraph on
13 the page, which is page 74. It says, "To sum
14 up the rate and amount of absorption of
15 nicotine by the smoker depends to a greater
16 or less extent upon the following factors,"
17 and it lists some factors there, including
18 number three, degree and depth of inhalation,
19 and number ten, alkalinity or acidity of the
20 tobacco smoke.

21 A It seems to be less -- less
22 convinced of ten than it does of three, but

1 they have listed a number --

2 Q Do you see that?

3 A They seem to be less convinced of
4 ten than they are of three.

5 Q So, in other words, even in 1964
6 the Surgeon General understood that smokers
7 took in different amounts of tar and nicotine
8 depending on how they smoked, correct?

9 A Correct.

10 Q The 1964 Surgeon General's report
11 was available to the public, including to the
12 FTC, correct?

13 A Correct.

14 Q The FTC understood and considered
15 the limitations of its FTC testing method,
16 but, nevertheless, chose to adopt that
17 method, correct?

18 A Correct.

19 Q The FTC has stuck with that method
20 for over 30 years, right?

21 A It modified it for carbon monoxide
22 in the '80s and it abandoned its lab in

1 the '80s.

2 Q In terms of the method. My
3 questions are with respect to the method.

4 A Except for -- except for carbon
5 monoxide.

6 Q The FTC has stuck with the method
7 for over 30 years, correct?

8 A Yes. Not as happily in the last --

9 Q Well, they stuck with it, correct?

10 A Yes.

11 Q Now, during your whole period of
12 time at the FTC from 1980 until 1994 there
13 was no point in any one telling the FTC that
14 the tar and nicotine ratings did not match
15 what an individual smoker received because
16 the FTC already knew that, didn't they?

17 A The FTC knew that at one level,
18 that it's tar/nicotine testing procedure did
19 not replicate what every smoker does. It
20 wasn't until 1983 when the commission
21 authorized the suit against Brown &
22 Williamson's advertising of Barclay

1 cigarettes that the degree of problems with
2 the method became more apparent to it.

3 Brown & Williamson brought to the
4 commission's attention the article by Neal
5 Benowitz in the 1983 New England Journal of
6 Medicine and that raised the concern about
7 the methodology to a different degree.

8 Q So you're saying that that occurred
9 in 1983?

10 A Correct.

11 Q So from 1983 forward the FTC fully
12 knew that the tar and nicotine ratings didn't
13 match what an individual smoker received,
14 correct?

15 MR. PATRICK: Objection.

16 THE WITNESS: The staff knew.

17 MS. PARKER: Let me show you an
18 exhibit that we're marking as the next one
19 as, let's see, the next one is 27.

20 (Wilkenfeld Deposition Exhibit
21 No. 27 was marked for
22 identification.)

1 BY MS. PARKER:

2 Q This is proposed rule making by the
3 FTC dated 1970. Do you see that?

4 A Uh-huh.

5 Q Under the first column there on the
6 left-hand side it references advertising the
7 tar and nicotine content. Do you see that?

8 A Yes.

9 Q So what Exhibit 27 shows is that
10 the FTC had proposed a trade regulation rule
11 in 1970 regarding tar and nicotine disclosure
12 that would have required the disclosure of
13 tar and nicotine ratings in cigarette
14 advertising, correct?

15 A Correct.

16 Q But the FTC never completed that
17 rule making, correct?

18 A Correct.

19 (Wilkenfeld Deposition Exhibit
20 No. 28 was marked for
21 identification.)

22 BY MS. PARKER:

1 Q Let me show you now what we've
2 marked as Exhibit 28. This is a press
3 release from the Federal Trade Commission,
4 correct? That's what it is correct?

5 A Correct.

6 Q It's dated October 1, 1970,
7 correct?

8 A Uh-huh, yes.

9 Q That's less than two months after
10 that notice of proposed rule making, correct?

11 A Correct.

12 Q In this press release it says, "The
13 FTC chairman said if the industry can devise
14 a voluntary plan that is feasible and
15 appropriate, the commission is willing to
16 consider it." Do you see that?

17 A Correct.

18 Q In that same press release the FTC
19 invited the industry to devise that voluntary
20 plan, correct? It says, "If the industry can
21 devise it." Do you see that?

22 A Yeah, I'm trying to -- yes.

1 Q So the FTC had suspended its rule
2 making that we had marked as Exhibit 27
3 because a voluntary agreement was negotiated
4 with Reynolds and Reynolds' competitors,
5 correct?

6 A But not entered into formal
7 agreement.

8 MS. PARKER: Let me show you now
9 Exhibit 29. One of those is for Mr. Patrick.
10 (Wilkenfeld Deposition Exhibit
11 No. 29 was marked for
12 identification.)

13 BY MS. PARKER:

14 Q Exhibit 29 is a copy of that
15 industry voluntary agreement with the Federal
16 Trade Commission, correct?

17 A Not with. This is a letter --

18 Q This is a letter to the Federal
19 Trade Commission?

20 A Right.

21 Q It's signed by Reynolds and
22 Reynolds' competitors, correct?

1 A Right.

2 Q If you will look at page three of
3 the letter, right before the first signature,
4 it says that the program is in lieu of any
5 formal trade regulation rule proceeding and
6 hearing. Do you see that?

7 A Yes.

8 Q So the FTC decided that there was
9 no need for a rule?

10 A Right.

11 Q Isn't it true that the tobacco
12 industries agreement achieved the same
13 objectives behind the FTC's proposed rule
14 that we've already marked as an exhibit?
15 It's the same objectives that were achieved,
16 right?

17 A It doesn't say here. I thought the
18 TRR would have included tar/nicotine on
19 packaging, but it doesn't say here, so that
20 was what the commission -- but it did not
21 enter into a consent agreement with the
22 industry.

1 Q It's a letter agreement, correct?

2 A It's a -- it is a statement by the
3 industry to the Federal Trade Commission as
4 to what the industry will voluntarily -- the
5 industry -- the Federal Trade Commission can
6 sue somebody and get a -- an order.

7 It can say it's going to sue
8 somebody and instead the company will consent
9 and agree to the imposition of an order,
10 which is what happened with the Surgeon
11 General's health warning in cigarette
12 advertising, or it can take action and the
13 actions will cause the Federal Trade
14 Commission to drop its legal -- its legal
15 processes, and this is the third type.

16 Q So you agree that the tobacco
17 companies agreed to include the tar and
18 nicotine ratings in their cigarette
19 advertising?

20 A Correct.

21 Q But if the companies had not agreed
22 to voluntarily disclose that information, the

1 FTC would have completed that rule making and
2 forced the companies to disclose tar and
3 nicotine ratings, correct?

4 A Well, one can never tell what the
5 commission might have done, but that's what
6 they said they wanted to do.

7 Q That's what the public health
8 community wanted, correct?

9 A The public health community had
10 indicated to the commission that it wanted
11 tar and nicotine ratings.

12 Q Let me ask you to look at what
13 we've previously marked as Exhibit 22, which
14 is a letter from the Federal Trade Commission
15 dated 1966. Do you see that?

16 A Yes.

17 Q Look on page ten, if you will.
18 This letter from the Federal Trade Commission
19 states that the American Cancer Society
20 advocated that the FTC lift the ban on tar
21 and nicotine ratings and it concluded that it
22 would be better still to require that this

1 information be provided. Do you see where I
2 read that?

3 A Yes.

4 Q Did I read that correctly?

5 A Yes, you did.

6 Q Now, since that time the FTC has
7 required that the tar and nicotine
8 measurements be reported in all cigarette ads
9 pursuant to the FTC method; is that right?

10 A Well, Girhart Gessel did not think
11 that was the case in the Brown & Williamson
12 case. He told us we had never had any
13 authority for re -- for our assumption that
14 the companies would comply.

15 He was correct in saying that we
16 had no legal basis, we had no legislative
17 authority, we did not have a TRR and we did
18 not have a consent agreement or an order. We
19 did have an agreement on the part of the
20 companies and an expectation that they would
21 do that and it was something the commission
22 definitely wanted.

1 Q If the companies had not done that,
2 the FTC would have taken action and
3 challenged it, correct?

4 A That's -- that's an interesting
5 question. There was a long period of time
6 certainly when I took over the program, and I
7 don't know in which direction it stretched,
8 how far back in which -- we were definitely
9 concerned about what would happen if a
10 company ever didn't do it because we had no
11 legal authority, so --

12 Q In fact every cigarette ad
13 since 1967 up to the present contains the
14 cigarette brand's tar and nicotine rating;
15 isn't that correct?

16 A Those companies that signed the
17 agreement --

18 Q All the major companies?

19 A Yeah. I think American Brands did
20 it pursuant to a -- a consent agreement.

21 Q Well, whether it was by the letter
22 agreement or consent agreement, my question

1 is, every cigarette ad since 1967 up to the
2 present contains the cigarette brand's tar
3 and nicotine ratings; isn't that correct?

4 A With the caveat that it's the major
5 companies, that it's not cigarette ads taken
6 out by retailers, that it's not cigarette ads
7 of foreign manufacturers and that it's not
8 cigarette ads of the 15 or so companies that
9 are not major companies. With that caveat
10 and the further caveat that there was a
11 period during which it was not clear what --
12 what was actually in and not in Brown &
13 Williamson's ads on Barclay, I'll agree with
14 the statement.

15 Q The tobacco companies really had no
16 choice but to disclose the tar and nicotine
17 ratings, did they?

18 A I think a prudent cigarette company
19 in the '60s and '70s would have put those
20 disclosures in ads, and even in the '80s.
21 Although after 1983, from 1983 on it was
22 clear that no one had to put a warning

1 disclosure in ads. The U.S. District Court
2 said they have no authority to do it and if
3 you don't want to put them in there, you
4 don't have to. But if you put them in there,
5 you have to explain how they relate to FTC
6 numbers.

7 Q So today could a major tobacco
8 company sell cigarettes without notifying the
9 FTC of the tar and nicotine levels?

10 A You mean without notifying the FTC
11 or without putting it in their --

12 Q I'm asking you first about
13 notifying the FTC of the tar and nicotine
14 levels.

15 A Yearly the Federal Trade Commission
16 issues 6Bs, which are compulsory process in
17 lieu of subpoena, to the companies to
18 disclose the whole bunch of information,
19 including the tar and nicotine content of
20 every single brand variety that is
21 manufactured. So under those circumstances
22 if they want to violate the 6B order, they

1 would do so at the peril of a -- of a lawsuit
2 based upon a failure to comply with
3 compulsory process.

4 Q Here's my question: Today can a
5 tobacco company sell a cigarette, a major
6 tobacco company, sell a cigarette without
7 notifying the FTC of the tar and nicotine
8 levels?

9 A Absolutely.

10 Q They can?

11 A Sure.

12 Q So if Reynolds had decided in 1971
13 that they were not going to disclose tar and
14 nicotine ratings any more the FTC would not
15 have had any problem with that?

16 A You asked me about now.

17 Q No. I'm going back now and asking
18 you first about '71. Let's go back.

19 A But the question before was about
20 now, right?

21 Q That's correct. I'm now asking you
22 about 1971.

1 A In '71 they probably risked a
2 lawsuit. I can't speak for the commission.
3 I wasn't there at the time.

4 Q In 1981, when you were there, if
5 Reynolds had decided in 1981 that they were
6 not going to disclose tar and nicotine
7 ratings any more, would the FTC have had a
8 problem with that?

9 A Might have had a problem, but they
10 would have been more reluctant to sue than
11 they were in '71.

12 Q What about 1991? If Reynolds
13 decided in 1991 --

14 A They would have been crazy to
15 sue -- the FTC would be crazy to sue in 1991.
16 Is that an opinion? But, yes, actually.

17 Q When you reviewed the cigarette ads
18 as part of your job at the FTC, when your
19 staff reviewed cigarette ads as part of their
20 jobs at the FTC, did you make sure that the
21 ads contained tar and nicotine disclosures?

22 A No.

1 Q You did not check?

2 A Not after 1983. Every so often I
3 would check if it was a matter -- there was
4 some cases that actually were quite relevant
5 to the issue of the tar and nicotine
6 disclosure, but in normal circumstances, no,
7 we didn't check that. I told you in 1983 we
8 were told we had no legal authority to
9 require it.

10 Q You were told that by the court?

11 A We were told that by the court.

12 Q If the tar and nicotine number
13 that's listed on an ad deviated from the most
14 recent tar/nicotine numbers that were
15 reported to the FTC by that cigarette
16 company let's say it's Reynolds -- would
17 Reynolds have to go to you to go to the FTC
18 and explain that change? They would,
19 wouldn't they?

20 A When? Now? Then?

21 Q Let's start 1971 again.

22 A My --

1 Q 1971.

2 A Let me get the --

3 Q If Reynolds has ads that list tar
4 and nicotine numbers reported by the FTC and
5 if the number on the ads deviated from the
6 numbers that were reported -- all right. Are
7 you with me there?

8 A Yeah.

9 Q In 1971 would Reynolds have to go
10 to the FTC and explain why there's a
11 discrepancy?

12 A On page three of the company's
13 agreement amongst themselves, "In the event
14 that any company determines that the tar and
15 nicotine value of any of its varieties have
16 becomes larger or smaller by more
17 than 20 percent of the most recently
18 published rounded commission test results,
19 that company will submit that variety of
20 cigarette to the commission for testing. If
21 within 30 working days the commission
22 supplies that company with its test

1 determination, the company will thereafter
2 utilize," et cetera. I presume that in
3 this '70s the companies and the Federal Trade
4 Commission followed this. I --

5 Q You're reference what we previously
6 marked as an exhibit?

7 A Defendant's Exhibit 29.

8 Q So that was 1971 we were talking
9 about? What about 1981? Same answer?

10 A 1981. Well, the same agreement was
11 in effect. I think the companies would
12 have -- okay, there's a -- you know, we
13 weren't -- by 1981. Actually in 1981 the
14 commission wasn't publishing its tar and
15 nicotine results. We were enjoying by Brown
16 & Williamson and there was a period of at
17 least one, if not two years, where we didn't
18 get a single tar and nicotine report out.

19 Q What about 1980?

20 A 1980 I think it would have been the
21 expectation. I think that the commission was
22 probably not doing two tests a year at that

1 time and was probably only doing one test. I
2 can't speak by personal knowledge what
3 happened in 1980, but the letter would seem
4 to indicate that there was an obligation that
5 the companies felt to either test it
6 themselves or give it up for testing to the
7 FTC.

8 Q Is it your understanding that this
9 voluntary agreement between the FTC and the
10 major companies is still in effect?

11 A This one (indicating)?

12 Q Yeah.

13 A No. No, they have a new one.
14 Again, it's not between. It's between the
15 companies. I can only refer you to Gary
16 Girhart Gesell, who was very specific that
17 the agreement was between the companies and
18 that the commission was neither a party to
19 nor a beneficiary of the agreement.

20 Q Let's move on. What about the 1991
21 time period. In 1991, if the FTC number
22 listed on the ad or Reynolds' ad was

1 different than the most recent tar and
2 nicotine number numbered reported by the FTC
3 method, Reynolds would have been required to
4 go to the FTC and explain the change and
5 report the difference in 1991, correct?

6 A Do you have the -- the letter that
7 modifies this letter?

8 Q No.

9 A I don't know what the -- there was
10 a procedure in there. By 1991 I think the
11 companies were well aware of the -- the
12 ambivalence of the commission towards its
13 test and the reporting of the numbers and the
14 reluctance or impossibility of the commission
15 suing anybody on anything relating to the tar
16 and nicotine testing, so it would be very
17 hard to speak of an obligation in 1991.

18 Q Let me ask you this today: Is
19 there an obligation on the part of the major
20 tobacco companies to disclose tar and
21 nicotine rating in cigarette advertising?

22 A I'm no longer a member of the

1 commission staff, so I can only speak as a --
2 as an ex-commission person who has criticized
3 the method.

4 Q My only question today is, is there
5 an obligation.

6 A No. The companies do it because of
7 past practice. They may have certain fears,
8 but the commission would be in no -- would
9 not be able to sue.

10 Q Did the commission ever inform the
11 companies of their situation that you've just
12 told us about?

13 A The commission is not a party to
14 this understanding so that there was nothing
15 to explain and, no, the answer is no.

16 Q Never did?

17 A Well, they haven't -- they
18 haven't -- no, they're -- they're Federal
19 Register notices have had to do with the --
20 their insecurities about the system or the
21 methodology.

22 Q Well, my question is, I think can

1 be answered yes or no, did the FTC ever tell
2 the major cigarette companies that they had
3 no obligation to disclose tar and nicotine
4 ratings in cigarette advertising?

5 A I think they mentioned that at
6 Brown & Williamson after the Barclay matter
7 because the court specifically said Brown &
8 Williamson does not have to include any
9 numbers in its advertising if it chooses not
10 to.

11 Q Besides this discussion that you
12 believe the FTC had with Brown & Williamson,
13 did the FTC tell any of Brown & Williamson's
14 competitors --

15 A Nobody officially.

16 Q Nobody officially?

17 A Right.

18 Q Tar and nicotine ratings are not
19 required to be displayed on the cigarette
20 packages themselves, correct?

21 A Absolutely, right.

22 Q Isn't it true today that there are

1 very few brands of cigarettes on the market
2 that report the tar and nicotine ratings on
3 the packages?

4 A You know, the last time I looked at
5 this, and it has not been recently, was a
6 study that was done, showed that there
7 were -- that the packages that disclosed the
8 tar and nicotine levels were really in the
9 ultra low and low area and that no high tar
10 packages disclose the numbers. But as to
11 what percentage of -- of brands did on the
12 package I can't tell you that.

13 Q Well, isn't it true that there are
14 very few brands of cigarettes on the market
15 today that report the tar and nicotine
16 ratings on the packages? Can you at least
17 estimate that it's very few?

18 A No, I can't. I mean as I --

19 Q You just don't know one way or the
20 other?

21 A I really don't now. I mean I know
22 the ones that do and I know that there's a

1 study that shows that it's usually the
2 brands 5 and 6 milligrams and below, but
3 other than that I -- I don't.

4 Q Do you agree that advertising is
5 the most effective way to disseminate the tar
6 and nicotine rating information to consumers?

7 A No, I don't agree at all.

8 Q You do not agree?

9 A No.

10 Q The advertising?

11 A Well, no. Let me qualify that.
12 The FTC tar and nicotine disclosure that is
13 in cigarette advertising at the moment is not
14 the most effective way.

15 However advertising claims based
16 upon those numbers seem to be the only way
17 the consumers get information about the tar
18 and nicotine level.

19 Q You're answering something I didn't
20 ask.

21 A So you want to strike it, right?
22 It's such a good answer.

1 Q Here's my question. If you could
2 try to listen and be very precise.
3 Advertising is the most effective way to
4 disseminate the tar and nicotine rating
5 numbers to consumers? Do you agree with
6 that?

7 A You mean just yes or no? That's a
8 hard yes or no. I mean it depends -- I mean
9 advertising can either be very effective -- I
10 mean if -- if the company who is using the
11 numbers wants to convey the number through
12 advertising, yes, it's probably the most
13 effective way of doing it. If they don't, on
14 the other hand, it isn't.

15 Q Does the FTC currently have
16 guidelines as to the manner in which
17 cigarette ads should disclose the tar and
18 nicotine ratings?

19 A No.

20 Q Do they at any point in time have
21 guidelines as to the manner in which
22 cigarette ads should disclose tar and

1 nicotine ratings?

2 A You know, I -- with the caveat that
3 I don't know what the guide said from 1967
4 on, no, they never did have guidelines except
5 for -- except for Barclay. I mean with
6 Barclay we had agreements. With Brown &
7 Williamson we had agreements on -- on Barclay
8 and on Kool ultra.

9 Q There are no major instances where
10 major a cigarette company failed to disclose
11 the tar and nicotine rating numbers in its
12 advertising?

13 A I could not even begin to say yes
14 or no. I mean I have no evidence that they
15 ever did fail to do that, but, you know, it
16 was never brought to my attention by any of
17 the sources that -- that bring complaints to
18 the commission or through my own ad
19 monitoring.

20 Q Well, you agree, don't you, with
21 the general proposition that the more
22 information consumers have, the better

1 purchasing decisions they can make?

2 A I agree with the statement that the
3 more honest and truthful information that
4 consumers have the better their choices.

5 Q The FTC has that same point of
6 view; is that correct?

7 A The FTC definitely has the view
8 that the sovereign consumer that has the most
9 information is the best consumer, yeah.

10 Q This general proposition that we're
11 talking about also applies to cigarettes and
12 cigarette advertising, correct?

13 A Honest truthful factual
14 information. Oh, geez. Just as I thought
15 you were getting to end of the book. Okay.

16 MR. PATRICK: Can we take two
17 minutes and we'll keep it at two minutes just
18 to stretch.

19 MS. PARKER: Just two minutes
20 though.

21 THE VIDEOGRAPHER: 3:25 p.m. off
22 the record.

1 (Wilkenfeld Deposition Exhibit
2 No. 30 was marked for
3 identification.)

4 THE VIDEOGRAPHER: 3:33 back on the
5 record.

6 BY MS. PARKER:

7 Q Let me show you now what we have
8 marked as Exhibit 30. Do you have that in
9 front of you?

10 A I thought I saw this one before.

11 Q This is 1988 hearings?

12 A The Daniel Oliver --

13 Q Correct.

14 A Didn't I look at this before?

15 Q This is the --

16 MR. PATRICK: That's a different
17 hearing.

18 THE WITNESS: A different hearing.

19 BY MS. PARKER:

20 Q Let me bring your attention your
21 attention to the exhibit at page 120, which
22 is the last page. Are you there?

1 A Yes.

2 Q Ask you if it's correct that
3 in 1988 the chairman of the FTC testified
4 before congress that, as a general matter, "I
5 believe that advertisements that accurately
6 convey information on tar and nicotine
7 content can be a valuable source of
8 information to consumers. Advertising that
9 provides comparative information on different
10 tar and nicotine levels can be especially
11 useful." Do you see that?

12 A Yes.

13 Q Did I read that correctly?

14 A It definitely represented his
15 views, yes.

16 Q That was the views of the FTC
17 in 1988, correct? That was the date of the
18 testing anyway?

19 A I just want to see in what capacity
20 he was testifying. You don't have his
21 written testimony, do you?

22 Q Well, this is a prepared statement,

1 if you will look on page 110.

2 A Yeah. Sometimes he appeared as
3 himself and sometimes he appeared for the
4 commission.

5 Q Well, this says, "I am appearing
6 here today at the request of the
7 subcommittee."

8 A So he may have been appearing in
9 his personal capacity as chairman as opposed
10 to -- that's why if you see his written
11 testimony, you can either see whether he's
12 appearing in his capacity as spokesperson for
13 the commission or only spokesperson for
14 himself.

15 Q Let me show you the next exhibit
16 which is? Exhibit 31.

17 A But I mean that definitely was his
18 opinion.

19 (Wilkenfeld Deposition Exhibit
20 No. 31 was marked for
21 identification.)

22 BY MS. PARKER:

1 Q Let me show you Exhibit 31.
2 Consumers today are given information about
3 the tar and nicotine yield of cigarettes
4 based on the FTC method, correct?

5 A I'm sorry?

6 Q Consumers today are given
7 information about the tar and nicotine yield
8 of cigarettes based on the FTC method,
9 correct? That's the method that's being used
10 today, correct?

11 A Yes. It was rest of the sentence I
12 was having trouble with. The -- the
13 information that they get from advertising is
14 about the brands that are advertised if
15 they -- if they see those numbers.

16 Q So consumers today are given
17 information in the advertisements by the
18 major companies about the tar and nicotine
19 yield of cigarettes based on the FTC method,
20 correct?

21 A Correct. Except for Barclay and
22 Ultra -- Kool Ultra.

1 Q Exhibit 31 is a report to congress
2 by the Federal Trade Commission in 1967,
3 correct?

4 A Yes.

5 Q Let me bring your attention to page
6 eight of the report and, again, this is an
7 FTC report to congress and it states up in
8 the first paragraph there, "For the
9 information of cigarette smokers the
10 commission favors mandatory labeling of tar
11 and nicotine."

12 A I'm sorry. Page eight?

13 Q Page eight, first full paragraph,
14 the seventh line down.

15 A Got it.

16 Q Again, this is an FTC report to
17 congress that states that, "For the
18 information of cigarette smokers the
19 commission favors mandatory labeling of tar
20 and nicotine content on cigarette packages
21 and in cigarette advertisements and other
22 measures that will prompt cigarette

1 manufacturers to develop less hazardous
2 cigarettes." Did I read that correctly?

3 A Yes, you did.

4 Q Is that the FTC's position today as
5 well as in 1967?

6 A I doubt it. I don't think that at
7 this point they would favor mandatory
8 labeling on packages and in advertisements.

9 Q When did the FTC's position change,
10 if it did.

11 A I think it began changing in
12 the '80s. They -- what did they have? One
13 or two Federal Register notices. I mean
14 starting with the -- the reference of the tar
15 and nicotine procedure to the National Cancer
16 Institute in '94 and the Federal Register
17 notices that followed that commission
18 indicated a concern about its methodology.

19 Q Let me ask you about the period of
20 time that you were at the FTC from 1980
21 until 1994. During that period of time when
22 you were there was your view on the value of

1 tar and nicotine disclosure the same as the
2 FTC's view at that time?

3 A No.

4 Q You had a different view?

5 A Quite a different view.

6 Q What advice did you give to the FTC
7 about tar and nicotine disclosures when you
8 were there?

9 A Starting in about 1983, following
10 the Barclay matter, during the -- we had --
11 we had several things going on at that time.
12 We had the Barclay matter and we had an
13 independent Federal Register notice review on
14 compensatory smoking.

15 I advised the commission -- I'm
16 trying to remember if -- it did not get past
17 the bureau. I mean my advice got as far as
18 the bureau. It did not get as far as the
19 commission. I advised the bureau that they
20 should begin developing consumer information
21 pamphlets explaining to consumers about the
22 dangers inherent with the numbers and the

1 misuse of the products. I sort of kept up a
2 steady drum beat from about 1983 on.

3 Q But the bureau rejected --

4 A You're right, no one was listening.

5 Q But the bureau rejected --

6 A That's absolutely right.

7 Q The commission never heard of it
8 because the bureau had rejected it.

9 A Did the commission ever hear it?
10 I'm trying to remember if anything I ever
11 sent up got past the bureau in -- in that
12 period. You know, I would put it into -- no,
13 I don't think it ever did get past the -- the
14 bureau.

15 Q That would be Mr. Peeler?

16 A No, no, no, that would be the --
17 he's the associate director I got it past.
18 Let's see. Who would have been the bureau
19 directors during those periods. Bill
20 McCloud, Amanda Peterson -- you know, I'd
21 have to get the dates and who was where at
22 what time. I have trouble getting it past

1 the Bureau of Economics.

2 Q Were all of these individuals who
3 served on the bureau who rejected your
4 recommendations honorable people?

5 A Were they honorable? They were
6 honorable, but they were -- they were
7 political appointees.

8 Q Were they honorable people?

9 A Were they honorable people?

10 MR. PATRICK: I'm going to object.

11 THE WITNESS: You know, I don't
12 know what you mean by honorable. You know,
13 it's a -- I would not impugn the honesty of
14 any of them, but did they make their decision
15 based upon the facts, no. But they honorably
16 didn't make their decision based upon the
17 facts. I don't want to impugn their -- their
18 honorableness, but --

19 BY MS. PARKER:

20 Q Well, give me the names of the
21 people there the at bureau who rejected your
22 recommendations that you think acted

1 improperly.

2 A Nobody acted improperly. I mean
3 it's a -- it's a political animal. So
4 everybody behaved the way the system is
5 supposed to work. I mean you have an
6 election, president and the congress win. I
7 mean they -- they have a political party.
8 They get to appoint the people who are at the
9 agencies. So there's is no dishonor there.

10 Q That's how America works?

11 A That's how America works, that's
12 right, but it wasn't -- it wasn't consistent
13 with the facts as far as what we knew about
14 smoking and health. That's all.

15 Q Well, as far as what you thought
16 the position should be?

17 A That's true. That's absolutely
18 right.

19 Q Other people that you consider
20 honorable people held different views at the
21 FTC; is that correct?

22 A Right.

1 Q Those people rejected your
2 recommendations?

3 A Yes.

4 Q Don't you believe that smokers
5 should know the amount of tar in nicotine
6 that their cigarette contains?

7 A That's just not a yes or no answer.
8 I mean your numbers don't tell them, so --
9 was should they know.

10 Q Should they know the amount of tar
11 and nicotine that their cigarette contains.

12 A Cigarettes don't contain tar. Tar
13 is what's produced when you burn the product
14 and it's what's in the smoke and it's the
15 gunk that stays and adheres to your lungs.
16 So it's not what's in the cigarette.

17 You know, if you talk -- if you
18 talk about nicotine, there is nicotine in the
19 rod. You know, shouldn't consumers know how
20 much nicotine is in the rod? Maybe yes,
21 maybe know. Should they know how much
22 nicotine they're going to get? Maybe yes,

1 maybe no. Does the number of the FTC method
2 tell them? No. I mean the one thing that
3 was clear didn't.

4 On tar, if their -- I think that
5 all public health authorities would continue
6 to agree that if a consumer could, in fact,
7 get information that rated a product by what
8 the consumer was going to get as far as tar
9 was concerned, you know, whether there was a
10 way of determining that I would get this much
11 from this cigarette and that much from that
12 cigarette, and the composition of the tar was
13 the same in both cigarettes, yes, that would
14 be very useful information, but that system
15 doesn't exist.

16 Q I move to strike the unresponsive
17 portion of your answer.

18 A Okay.

19 Q Do you believe that smokers should
20 know the amount of tar and nicotine that
21 their cigarette smoke contains? Yes or no?

22 A Yes or no. It's too ambiguous. I

1 mean if you want to say do I believe that
2 consumers should know the FTC tar nicotine
3 numbers --

4 Q That wasn't my question.

5 A I know, but it's a hypo -- it's a
6 hypothetical without a boundary. I mean I
7 can't give you a yes or no because I don't
8 quite know what tar and nicotine you're
9 talking about. I mean --

10 Q I said the tar and nicotine in the
11 cigarette smoke.

12 A If by that -- do they know how much
13 tar and nicotine is in the cigarette smoke.
14 If it's not in reference to what they get,
15 no.

16 Q In 1987 the FTC stopped conducting
17 the tar and nicotine test themselves,
18 correct?

19 A Absolutely, yeah.

20 Q The FTC had been conducting tests
21 for 20 years from 1967 up until 1987,
22 correct?

1 A Uh-huh.
2 Q Is that a yes?
3 A Yes.
4 Q During that whole 20-year period
5 the cigarette companies were also using this
6 TITL to test tar and nicotine levels?
7 A Yes.
8 Q The cigarette manufacturers during
9 that whole 20 years have been using the exact
10 same method as the FTC labs?
11 A The TITL lab, the exact same
12 method.
13 Q What does TITL stand for?
14 A Tobacco Institute Testing
15 Laboratory.
16 Q The FTC closed its testing lab
17 because of the cost of continuing the test
18 and because the FTC believed that the
19 industry testing was as good as the
20 Government's, correct?
21 A The decision to close that -- the
22 lab was one that had been arrived at by

1 everybody who was involved with the lab.

2 Q Ms. Wilkenfeld, let me interrupt.

3 A The commission's decision, I think,
4 indicated that those were the two reasons.

5 Q So you agree with my question?

6 A Yeah, but I'd go further and say
7 that the TITL and the FTC had had virtually
8 the same numbers for 20 years and that we
9 were very confident that TITL would produce
10 good numbers.

11 Q So the testing that had been
12 conducted by TITL consistently, uniformly
13 came up with the same numbers as the FTC?

14 A When it didn't, the -- the head of
15 the two labs were able to work it out and it
16 was -- it was --

17 Q Those were just minor
18 circumstances?

19 A Very, yeah.

20 Q Did you attend a hearing in
21 congress in 1988 that addressed the FTC's
22 decision to close the lab?

1 A Is this Luken, Tom Luken of Ohio?
2 Yes, he was very upset.

3 Q Today testing is still being
4 conducted by TITL, correct?

5 A What happened as a result of the
6 settlement? That's, you know -- somebody
7 said to me that TITL --

8 Q Do you know?

9 A You know, I don't know that. I
10 know that up until the settlement TITL
11 continued to do the testing and I believe
12 that they still are, but I don't know what
13 happened as a result of the tobacco institute
14 having to -- so I -- I can't --

15 Q You just don't know?

16 A No.

17 Q The transfer of testing from the
18 FTC to TITL was a result of an agreement
19 between the FTC and the tobacco companies,
20 correct?

21 A Well, again, it's the same
22 amorphous -- it's the same amorphous position

1 that this first letter was. The companies
2 got together and wrote a letter in which they
3 agreed that this was what they were going to
4 do, so that there was discussions that went
5 back and forth and informal agreement, but
6 there is nothing formal. Again, there's
7 still nothing formal and nothing legal about
8 it.

9 Q The FTC agreed with that and closed
10 its lab?

11 A Yes, but, again, it's not a legal
12 or binding decision. The industry presented
13 another letter to the Federal Trade
14 Commission and said this is what we're going
15 to do under these circumstances. Because the
16 industry said that's what they were going to
17 do under those circumstances, the commission
18 felt comfortable closing its lab.

19 Q The FTC still maintains oversight
20 of the TITL testing program, doesn't it?

21 A The oversight was supposed to occur
22 as a result of both the data being presented

1 to the FTC and them doing statistical stuff
2 as well as Harold Pillsbury allowed access to
3 the lab. I haven't seen him in a number of
4 years. He was getting old. I still I assume
5 that he is. But I don't have personal
6 knowledge.

7 We need to go off the record
8 because of the noise from your firm.

9 THE VIDEOGRAPHER: Off the record
10 at 3:49 p.m.

11 (Discussion off the record)

12 THE VIDEOGRAPHER: On the record
13 at 3:49 p.m.

14 BY MS. PARKER:

15 Q Is it your testimony that you just
16 don't know one way or the other whether the
17 FTC continues to maintain oversight of the
18 TITL testing program?

19 A No, because I'm not --

20 Q The FTC.

21 MR. PATRICK: Why don't we go off
22 the record.

1 THE VIDEOGRAPHER: 3:49 off the
2 record.

3 (Discussion off the record)

4 THE VIDEOGRAPHER: 3:50 p.m., back
5 on the record.

6 BY MS. PARKER:

7 Q The FTC has unrestricted the TITL
8 laboratory, correct?

9 A It did when I left the commission.

10 Q Do you have any knowledge as to --

11 A I have no knowledge, no.

12 Q The FTC made unannounced visits to
13 inspect and check the lab, correct?

14 A They had the authority to do that.
15 That was -- TITL agreed that that's what they
16 could do.

17 Q That's the procedure that you
18 helped to create, correct?

19 A Yes.

20 (Wilkenfeld Deposition Exhibit
21 No. 32 was marked for
22 identification.)

1 BY MS. PARKER:

2 Q Let me show you what we've marked
3 as Exhibit 32, which is a letter to you dated
4 June 30, 1987, and you were informed that the
5 FTC, if you look over on the second page,
6 will be permitted to visit TITL on any
7 schedule they deem appropriate without prior
8 notice to monitor the handling and testing of
9 the cigarettes. Do you see that?

10 A Yes.

11 Q Was that the procedure?

12 A That was what they said they would
13 allow.

14 Q Is that what actually happened?

15 A I know that Mr. Pillsbury went
16 there on occasion. I don't know whether he
17 did announced or unannounced. I know he was
18 comfortable with the assess that he had.

19 Q In addition, you were also informed
20 in that letter that the FTC would be given
21 access to any TITL computer sheets and other
22 test documents that are generated in the

1 course of any testing cycle. Do you see
2 that?

3 A Yes.

4 Q Did that happen?

5 A I don't know, but, again, I know
6 that Mr. Pillsbury was satisfied with the
7 arrangement.

8 Q This arrangement where the industry
9 ran and funded the testing but it was being
10 scrutinized by the FTC is the same
11 arrangement for how testing is done for
12 appliance labeling, correct?

13 A Let's see. Is that true? Well,
14 you know, I haven't read the appliance
15 labeling rules. Do they have to submit
16 reports?

17 Q Let me bring your attention back
18 to Exhibit 5, Mr. Peeler's remarks.

19 A If -- if Mr. Peeler said it, it's
20 true. He knows those rules better than I do.

21 Q So if Mr. Peeler said that the
22 arrangement with the tobacco companies is the

1 same as the arrangement for appliance
2 labeling, that would be correct?

3 A Absolutely.

4 Q If Mr. Peeler said that the
5 arrangement that the tobacco companies had
6 for testing is the same as the testing was
7 done for octane levels, that would be true?

8 A That would be true.

9 Q If Mr. Peeler said that the tobacco
10 industry testing is the same as the testing
11 done for insulation efficiency, that would be
12 true?

13 A You mean that they do the test
14 and -- yes.

15 Q Now, once the TITL assumed the
16 testing program in 1987 the FTC continued to
17 publish the results of the test, correct?

18 A Yes.

19 Q Now, there were objections to the
20 transfer of testing from the FTC to TITL,
21 correct?

22 A Correct.

1 (Wilkenfeld Deposition Exhibit
2 No. 33 was marked for
3 identification.)

4 BY MS. PARKER:

5 Q We've already talked about the
6 hearing. I'm going to show you what's been
7 marked as Exhibit 33. Now this is the
8 hearing that Congressman Luken held to
9 consider the FTC decision to close its
10 testing lab, correct?

11 A Correct.

12 Q That is what we've marked as
13 Exhibit 33, correct?

14 A Yes.

15 Q Those are hearings from 1987,
16 right?

17 A Yes.

18 Q Let me bring your attention to
19 page 51. The third full paragraph begins,
20 "The American Lung Association." Do you see
21 that?

22 A Uh-huh.

1 Q It says, "The American Lung
2 Association recommends that the Federal
3 Government resume its role in the testing
4 program." Do you see that?

5 A Yes.

6 Q So the American Lung Association
7 objected to putting the testing in the hands
8 of TITL, right?

9 A Yes.

10 Q The American Heart Association also
11 objected, correct?

12 A Yes.

13 Q If you look at the following page,
14 page 52, the American Heart Association's
15 statement there objecting to the FTC closing
16 its testing program, do you see that?

17 A Yeah, they both criticize the
18 method and wanted the FTC to do it.

19 Q In fact, the cigarette
20 manufacturers themselves strenuously objected
21 to closing the FTC lab, didn't they?

22 A The cigarette industry strenuously

1 object -- I'm sorry. Did the cigarette
2 industry strenuously object. I'm trying to
3 remember. You know, truthfully I'm having
4 trouble remembering. I --

5 (Wilkenfeld Deposition Exhibit
6 No. 34 was marked for
7 identification.)

8 BY MS. PARKER:

9 Q Let me show you what we've marked
10 as Exhibit 34. This is a letter dated
11 May 26th, 1987 that references a meeting with
12 Ms. Judith Wilkenfeld. Do you see that?

13 A Uh-huh.

14 Q Look at the third paragraph there.
15 This is a letter from Mr. Rupp.

16 A Okay.

17 Q It says, "I informed the FTC staff
18 that the major domestic cigarette
19 manufacturers were unanimously of the view
20 that the FTC laboratory should remain open."
21 Do you see that?

22 A Yes.

1 Q Does that refresh your
2 recollection?

3 A Well, I'm sure they wanted it to
4 continue with us, but we were able to work
5 out an arrangement for them to do it. No,
6 no, I see that he says that they would oppose
7 the closing. Mr. Rupp was an honorable man.
8 If he said that, that -- that is the view he
9 was expressing.

10 Q Down in the last sentence on the
11 first page it says, "During all subsequent
12 discussions with FTC staff concerning the
13 laboratory I presented the manufacturer's
14 strongly-held view that the laboratory not be
15 closed." Do you see that?

16 A Yes.

17 Q So if Mr. Rupp said that, that was
18 true?

19 A That definitely represents his view
20 and I can't dispute that.

21 Q You don't dispute that Mr. Rupp
22 told you that information?

1 A Correct.

2 Q This objection was also made clear
3 to Congressman Luken in congress at the
4 hearing, correct?

5 A Did Bill Steele testify?

6 MS. PARKER: Let me show you what
7 we've marked as Exhibit 35.

8 (Wilkenfeld Deposition Exhibit
9 No. 35 was marked for
10 identification.)

11 BY MS. PARKER:

12 Q Exhibit 35 is a letter to
13 Congressman Luken dated June 3, 1987. In
14 that first paragraph there it says, "The
15 cigarette manufacturers have and will
16 continue to oppose the closing of the
17 laboratory." Do you see that?

18 A Yes.

19 Q So do you agree with me now that
20 the tobacco companies also made it clear to
21 congress that they opposed the closing of the
22 lab?

1 A Apparently.

2 Q But there have, in fact, been no
3 problems with the TITL testing, had there?

4 A None that I know of.

5 Q This information about the FTC's
6 T&N ratings is still being published by the
7 FTC. I believe we've established that.

8 A Yes.

9 Q This information about the FTC's
10 tar and nicotine ratings is also disseminated
11 to the public through ads, correct?

12 A Yes.

13 Q The number ratings that are
14 contained in the FTC reports are the same as
15 those that are disclosed in the ads, correct?

16 A Well, I mean the with certain
17 caveats, yes.

18 Q In general?

19 A In general.

20 Q Now, as between the FTC publishing
21 of the tar and nicotine numbers on the one
22 hand and the advertisements statements about

1 the tar and nicotine numbers on the other
2 hand, isn't it true that the advertisements
3 are the more effective way of disseminating
4 that information, i.e., the numbers, to the
5 public?

6 A Are you talking about the -- the
7 disclosure in the ads?

8 Q Of the numbers. Let me restate my
9 question, make sure you understand exactly
10 what I'm asking.

11 A Okay.

12 Q I'm asking you to compare on the
13 one hand the FTC's publishing of tar and
14 nicotine numbers, all right, and on the other
15 hand the publishing, if you will, of the tar
16 and nicotine numbers by the cigarette
17 companies on the ads?

18 As between those two, isn't it
19 correct that advertising is the more
20 effective way of disseminating the
21 information to the public?

22 A As between the FTC's publication

1 and the disclosure that appears in the ad as
2 a result of the agreements by the cigarette
3 companies, I feel there's no difference.

4 Q You feel there's no difference?

5 A Right.

6 Q Do you believe that the FTC report
7 publishing the tar and nicotine numbers
8 reaches the same number of people as the
9 cigarette ads?

10 A I believe that -- that consumers
11 who want to know the numbers have always
12 gotten those numbers from the FTC. It was a
13 very popular publication on the part of the
14 FTC. We sent them out to anybody who wanted
15 them. For all I know they might even be on
16 the Web by now, number one.

17 Number two, doctors who wanted to
18 know them get them off the Web or got them
19 from the commission. The disclosures in ads
20 have two problems. One, they don't cover
21 most of the brands of cigarettes. It's only
22 what advertised. So they don't -- they don't

1 cover generics.

2 They don't cover all sorts of
3 products that might be brand extensions.
4 Secondly, they're usually in very small type
5 and the color contrast is very poor. So I'm
6 not sure the consumers get that much
7 information from those. The survey data
8 would suggest that consumers don't have a
9 good idea of the numbers.

10 Q I move to strike the unresponsive
11 portion of your answer.

12 Do you agree with me that generics
13 have no relevance to Mr. Little's case?

14 MR. PATRICK: Objection.

15 THE WITNESS: I don't have any idea
16 whether generics have any relevance. You
17 didn't ask me about Mr. Little. You asked me
18 about whether I believe that consumers get
19 more information about tar and nicotine
20 numbers from the ads -- the ad disclosures
21 from -- and then from the FTC reports and I
22 said no.

1 BY MS. PARKER:

2 Q Well, what I'm asking you now,
3 though is do you agree that generics have no
4 relevance to Mr. Little's case?

5 A I have no knowledge.

6 Q Do they have any relevance to the
7 opinions that you have with respect to
8 Mr. Little's case?

9 A Do they have any -- well, my
10 opinions are -- are being sought about things
11 that happened at the Federal Trade Commission
12 and --

13 Q So is your answer no?

14 MR. PATRICK: Can you state the
15 question again?

16 THE WITNESS: Yeah.

17 BY MS. PARKER:

18 Q Do you agree that generics have no
19 relevance to the opinions that you are going
20 to give in Mr. Little's case?

21 A That generics have nothing to do
22 with my opinion?

1 Q Is that correct?

2 A I'm not sure what a no means.

3 I'm -- yeah, okay. Because there's a double
4 negative there and I can't tell whether I say
5 no -- I think that my opinion about tar and
6 nicotine testing, tar and nicotine
7 advertising, deception, generics play a part
8 of that.

9 Q They do?

10 A Yes.

11 Q Did Mr. Little's smoke generics?

12 A I don't know.

13 Q Now, the system for reporting tar
14 and nicotine today is still essentially the
15 same one that was adopted by the FTC back
16 in 1967, correct?

17 A For reporting did you say?

18 Q For measuring.

19 A Except for carbon monoxide.

20 Q So the system for measuring tar and
21 nicotine today is essentially the same one
22 that was adopted by the FTC in 1967 with the

1 exception of carbon monoxide; is that your
2 testimony?

3 A You know, my understanding is that
4 TITL has upgraded the machinery and has --
5 has newer machinery which has greater
6 efficiency. I think it's the same essential
7 Camblridge filter method, which is otherwise
8 known as the FTC method, but we have to limit
9 that to TITL because the companies I'm told
10 do different things.

11 I don't know how that plays in. If
12 TITL hasn't tested, I think the companies are
13 allowed to include some of the numbers from
14 their own testing. So essentially in a very
15 generic sense it is still the Cambridge
16 filter pad method.

17 Q Do you recall that Reynolds
18 introduced a cigarette called Premier
19 in 1988?

20 A Yes.

21 Q During the course of your work at
22 the FTC at that time didn't you review the

1 advertising for the Premier cigarette?

2 A Yes.

3 Q The Premier ads did not contain tar
4 and nicotine ratings, did they?

5 A There -- there were no ads that
6 were disseminated if I remember. These were
7 mock ups. Yeah. Did they contain tar and
8 nicotine ratings?

9 Q Do you understand that Premier was
10 test marketed?

11 A Yes.

12 Q Do you understand that there were
13 advertisements for the test marketing of
14 Premier?

15 A Yeah. Were there no tar and
16 nicotine ratings.

17 Q That's what I'm asking you.

18 A I remember there was a big
19 discussion about whether there should be or
20 shouldn't be. I can't remember exactly.

21 Q What was the FTC's position as to
22 whether or not the Premier ad should contain

1 the tar and nicotine disclosure?

2 A The FTC didn't have a position. It
3 never got past the staff.

4 Q What was the staff position?

5 A Well, there was many opinions among
6 the staff.

7 Q What was your opinion?

8 A Mixed. That tar and nicotine
9 disclosures are required on cigarettes. This
10 was a cigarette. On the other hand, that
11 what was tar wasn't necessarily tar -- what
12 was tar for a conventional cigarette wasn't
13 necessarily tar for a -- a cigarette that
14 didn't burn and that -- what did you do with
15 glyceryl.

16 Q If I heard you right, you just said
17 that tar and nicotine was required on the
18 cigarettes. Is that what you just said?

19 A Tar and nicotine -- yes, that was
20 a -- that was our -- yes, I misspoke. It was
21 a --

22 Q At what point did you misspeak?

1 A Well, require -- at what point did
2 I misspeak when I -- when I used the word
3 "required." We did not -- I don't know what
4 we said to Reynolds. We would have at some
5 point, if the advertising had gone out,
6 probably said to them that according to their
7 agreement they were supposed to put tar and
8 nicotine disclosures in their ads. But as I
9 said, there was a conflict as to whether this
10 was the same tar as the tar that came out of
11 the -- the testing methodology for
12 conventional cigarettes.

13 Q Don't know what Reynolds was told;
14 is that your testimony, with respect to this
15 issue about whether or not the Premier ad
16 should contain --

17 A Well, ultimately the commission
18 didn't tell them anything. There were
19 discussions that were held and before we had
20 to make a recommendation to the bureau the
21 product was withdrawn from market.

22 Q You said there were discussions,

1 correct?

2 A There were lots of discussions.

3 Q In those discussions what did the
4 FTC staff members say to Reynolds regarding
5 whether the Premier ad should contain tar and
6 nicotine disclosures?

7 A I don't remember.

8 Q I'm going to ask you some questions
9 now about the warning labels. All right?

10 A Surgeon General's?

11 Q Yes. Now, the same time that we've
12 talked about earlier today when the FTC was
13 dealing with reporting the tar and nicotine
14 levels in advertising back in the early '60s
15 there was another major development related
16 to smoking and health when the Surgeon
17 General's first report was issued in 1964,
18 correct?

19 A Correct.

20 Q Do you remember that report being
21 issued?

22 A Absolutely. But not as an employee

1 of the Federal Trade Commission.

2 Q Pardon?

3 A But not as an employee of the
4 Federal Trade Commission.

5 Q In 1964 the Surgeon General's
6 report in this first report stated that
7 smoking may cause certain diseases including
8 lung cancer, correct?

9 A Do you have a copy of the report?

10 Q Well, do you remember?

11 A You know, I thought the finding on
12 lung cancer was stronger than that.

13 Q The report received widespread
14 coverage in the media, correct?

15 A Yes.

16 Q That same year in 1964 the FTC
17 announced that it had begun efforts to
18 establish rules regarding advertising and
19 labeling of cigarettes, correct?

20 A Correct. I think they actually
21 finalized the rule.

22 MS. PARKER: Let me show you what's

1 been marked as Exhibit 36.
2 (Wilkenfeld Deposition Exhibit
3 No. 36 was marked for
4 identification.)

5 BY MS. PARKER:

6 Q That's the notice of proposed rule
7 making from 1964, correct?

8 A Uh-huh, yes.

9 Q That was just a few days after
10 the 1964 Surgeon General's report was
11 released, correct?

12 A Yes. Yes.

13 (Wilkenfeld Deposition Exhibit
14 No. 37 was marked for
15 identification.)

16 BY MS. PARKER:

17 Q Let me show you now what we've
18 marked as Exhibit 37, which is a newspaper
19 article from the Chicago Daily Tribune that's
20 dated July 24, 1957. Do you see that?

21 A Yes.

22 Q I want to draw your attention to

1 the second page of what I've given you, which
2 is actually the first page of the article
3 there. The article is entitled, "Tells
4 change in tobacco at 800 degrees." Do you
5 see that?

6 A Yes.

7 Q Looking on down about halfway down
8 the page it says, "Dr. Heller and Surgeon
9 General Leroy E. Burney, head of the public
10 health service, in their testimony declined
11 to recommend printing of warning labels on
12 cigarettes."

13 A Yes.

14 Q Do you see that?

15 A Uh-huh.

16 Q It goes on to say, this is a quote,
17 "We don't have sufficient evidence at this
18 time of actual causative cancer agents in
19 tobacco to take such a step." Do you see
20 that?

21 A Yes.

22 Q So in 1957 the Surgeon General and

1 the director of the National Cancer Institute
2 agreed that there was not sufficient evidence
3 of causation of cancer to issue a warning
4 label; is that correct?

5 A That's what the article says.

6 Q Do you have any reason to dispute
7 that?

8 A I don't have any knowledge.

9 MS. PARKER: Let me show you what
10 we marked as Exhibit 38.

11 (Wilkenfeld Deposition Exhibit
12 No. 38 was marked for
13 identification.)

14 BY MS. PARKER:

15 Q In 1957 there was a hearing before
16 congress and there's a copy of the record.
17 If you look at page 139, there's testimony
18 from the Surgeon General Burney and it says,
19 "Our position is that we have informed the
20 public through the excellent coverage of the
21 press, radio and T.V., we have informed the
22 official health agencies in the states who

1 are responsible for this area and we have
2 informed the American Medical Association,
3 recognizing that many people will go to their
4 own physicians for advice." Do you see that?

5 A Yes.

6 Q So isn't it true that in 1957 the
7 Surgeon General of the United States
8 testified during congressional hearings that
9 there was not sufficient evidence to issue a
10 warning, correct?

11 MR. PATRICK: I'm going to object
12 to this line of questioning, but you can
13 answer.

14 THE WITNESS: I can only tell you
15 what I -- you just read. I mean I agree that
16 you just read that, but I'm not -- I have no
17 knowledge of these events.

18 BY MS. PARKER:

19 Q Do you have any reason to dispute
20 this testimony?

21 A As I say, all I can say is that
22 this is obviously the testimony.

1 Q So do you have any reason to
2 dispute it? No?

3 MR. PATRICK: Objection.

4 THE WITNESS: I can't either accept
5 or reject. I mean it's what he testified to.

6 BY MS. PARKER:

7 Q Would you consider the Surgeon
8 General authortive on health matters?

9 A Would I consider the Surgeon
10 General authortive on health matters?

11 MR. PATRICK: Objection. Which
12 Surgeon General?

13 THE WITNESS: Yeah, I was just
14 going to -- not just which Surgeon General,
15 but it's in which capacity he's speaking. I
16 mean when the Surgeon General in 1964 issued
17 a statement, he didn't issue it because he
18 was Surgeon General. He issued it as the --
19 as the head of a committee that had looked at
20 all of the science and it was a considered
21 opinion of many experts in the field. When
22 that Surgeon General made that statement,

1 that's authortive. Surgeon Generals opine on
2 a lot of things and they're not terribly
3 authoritative at some times.

4 BY MS. PARKER:

5 Q Do you have any reason to dispute
6 that Surgeon General Burney was
7 authoritative?

8 A On this?

9 Q On this issue?

10 A I have no way of knowing what he
11 based his opinion on.

12 Q Now, when the FTC proposed labels
13 for the cigarettes, it also announced that it
14 would conduct hearings in March 1964,
15 correct?

16 A That's what they usually do, but
17 I -- let me go back and --

18 Q The FTC invited public comment?

19 A How far back does -- got it. Got
20 it. They probably did notice and comment. I
21 don't know whether they had at that time --
22 nope, they said they should should have been

1 given a fair hearing.

2 Q Do you see that?

3 A You know, a fair hearing doesn't
4 necessarily mean that they have to have a
5 hearing. I don't know what their procedures
6 were at that time. I know what their
7 procedures were from 1980 on. From 1980 on,
8 if they had had done a TRR, they would have
9 been required to have a very explicit set of
10 hearings. These they did under the APA and
11 it would have been whatever the APA
12 required or whatever they felt was necessary.

13 Q Are you looking at Exhibit 36?

14 A Yes.

15 Q Let me bring your attention to the
16 second page there, middle column, second full
17 paragraph. It says, "A public hearing." Do
18 you see that.

19 A Then they were going to do a
20 hearing.

21 Q The paragraph immediately preceding
22 that says, "All interested persons are hereby

1 notified that they may file comments."

2 A Right.

3 Q Now, that you've read that --

4 A I assume that that was the plan.

5 Q They had hearings and they invited
6 public comment. All right. Do you agree
7 with that?

8 MR. PATRICK: Objection.

9 THE WITNESS: You know, if I could
10 see the final rule making, I would know
11 whether they held them, but they certainly
12 intended to hold them.

13 (Wilkenfeld Deposition Exhibit
14 No. 39 was marked for
15 identification.)

16 BY MS. PARKER:

17 Q Let me show you what we've now
18 marked as Exhibit 39. Of the groups that
19 submitted public comments to the FTC, one
20 group was the American Medical Association,
21 correct?

22 A Yes.

1 Q Exhibit 39 is a copy of the full
2 text of American Medical Association's letter
3 of testimony is what they call it to the FTC,
4 correct?

5 A Yes.

6 Q This volume is dated April 1964,
7 correct? It's on the first page.

8 A Yes.

9 Q So isn't it true that the American
10 Medical Association wrote to the FTC to give
11 comments and if you look at the first column,
12 second from the bottom paragraph, the
13 American Medical Association letter stated
14 with respect to cigarettes "Cautionary
15 labeling cannot be anticipated to serve the
16 public interest with any particular degree of
17 success. The health hazards of excessive
18 smoking have been well publicized for more
19 than ten years and are common knowledge."
20 Did I read that correctly?

21 A You read that correctly.

22 Q So in other words, the American

1 Medical Association was opposed to the
2 placing of warning labels on cigarette
3 packages in 1964 because the health hazards
4 were already common knowledge so warnings
5 were unnecessary, correct?

6 MR. PATRICK: Objection.

7 THE WITNESS: Whatever was going
8 through their minds I have no clue. I
9 mean --

10 BY MS. PARKER:

11 Q Well, this says what it says,
12 doesn't it?

13 A It says what it says, but --

14 Q The health risks of smoking were
15 common knowledge in 1964, weren't they?

16 A If you look at the smoking rates of
17 doctors at that time, you wouldn't think thta
18 they knew. Strike.

19 Q I move to strike that comment. If
20 you could answer my question, please.

21 MR. PATRICK: You know, I'm going
22 to continue to object to this line of

1 questioning on documents that obviously are
2 beyond the field of their expertise of this
3 witness. This testimony has not listed as
4 what her testimony will be in the disclosure
5 and this is certainly beyond the time frame
6 for when her testimony is concerned, but you
7 can answer.

8 THE WITNESS: I answered it, you
9 know. I I've read articles about what was
10 going -- why the AMA did this and --

11 BY MS. PARKER:

12 Q That's not my question.

13 A What was your question?

14 Q Health risk of smoking were common
15 knowledge in 1964, weren't they?

16 A No.

17 Q You say no?

18 A I say no. I mean if you look at
19 the data thta the FTC collected and its trade
20 regulation rules along the years, the
21 knowledge about the specific health risks of
22 smoking were not well known at all. They

1 were not well known, they were not well
2 understood.

3 Q Do you consider yourself qualified
4 as an expert as a historian?

5 A No, but you asked me. I mean I
6 said I didn't want to answer because I didn't
7 know this and now when I answer you tell me
8 I'm not an expert. No, I'm not an expert.

9 You asked me my opinion and my
10 opinion was having been alive in 1964, having
11 looked at historical data, I don't think
12 people were well informed. But I am not an
13 expert in this area. I don't even claim to
14 be at all.

15 Q So later that year in 1964 didn't
16 the FTC publish a rule requiring all
17 cigarette packages and ads to carry a warning
18 indicating that cigarette smoking is
19 dangerous to health and may cause death from
20 cancer and other disease?

21 A I hope that document is the one
22 that might give me the answer to that.

1 MS. PARKER: All right. This is
2 Exhibit 40.
3 (Wilkenfeld Deposition Exhibit
4 No. 40 was marked for
5 identification.)
6 THE WITNESS: I know that they
7 published a rule. Oh, God -- fair to --
8 okay. Let's see.
9 BY MS. PARKER:
10 Q If you'll look over at the second
11 page, the first column, the rule is stated
12 there. If you look at the very end it says,
13 "Is dangerous to health and may cause death
14 from cancer and other diseases." Do you see
15 that?
16 A I'm sorry. First page?
17 Q Yes.
18 A Second page?
19 Q Seconds page.
20 A Second page. Which column?
21 Q First column.
22 A First column.

1 Q Yes.

2 A Let's see. Yes.

3 Q So in 1964 the FTC was still
4 heavily involved in monitoring cigarette
5 advertisements, wasn't it?

6 A Yeah, much to its regret. Yes.

7 Q Isn't it true that congress
8 requested the FTC to suspend the effective
9 dates of its proposed trade regulation rule?

10 A It did.

11 Q The FTC agreed to do so?

12 A It did.

13 Q So congress said FTC, you're going
14 too fast and you need to slow down and the
15 FTC did that?

16 A No.

17 MR. PATRICK: Objection.

18 THE WITNESS: No. From what I --
19 again, you're going to ask if I'm an
20 historian and I'm not. From what I read the
21 FTC did this. Congress said don't do it.
22 Hold off until we can do it. The FTC

1 suspended its role for that period of time.
2 Whether in their heart of hearts
3 they thought congress was the right place or
4 not I can't tell you. I know that they
5 chafed at it forever after in their own
6 histories.

7 BY MS. PARKER:

8 Q Well, a second time didn't the
9 House Committee on Interstate and Foreign
10 Comemrce for a second time requested the FTC
11 to postpone the effective date of its trade
12 regulation rule?

13 A I'm sorry?

14 Q This happened twice that congress
15 asked the FTC --

16 A In '64 and you mean again like
17 in --

18 Q In August. In August.

19 A Oh, I don't know. Did they do it
20 twice?

21 Q You don't know?

22 A I have no idea. I do know that

1 they requested and that the -- they
2 ultimately took away jurisdiction for a
3 period of time.

4 Q The FTC thought that this proposed
5 rule would be challenged, didn't it?

6 A Challenged by whom?

7 Q In court. Challenged.

8 A You know, I have no knowledge, but
9 I would assume they assumed that.

10 Q Isn't it true that prior to this
11 proposed trade regulation rule the FTC had
12 never issued a trade regulation rule?

13 A Really?

14 Q You don't know one way or the
15 other?

16 A I have no idea. You mean in any
17 area whatsoever?

18 Q With respect to cigarette
19 advertising.

20 A Oh. My understanding it is the
21 first -- oh. My understanding it was the
22 first TRR they did with cigarettes. I

1 thought you said any TRRs. I don't have a
2 firm grasp on that, but I think that's true.

3 Q Then the next year, in 1965,
4 President Johnson signed a law requiring a
5 statement on cigarette packages that stated,
6 "Caution: Cigarette smoking may be hazardous
7 to your health," correct?

8 A Given that you've read the dates
9 correctly, I mean I -- I'd have to look at
10 the Federal Cigarette Labeling and
11 Advertising Act to see if you got the dates
12 and the advertising right, but that happened.

13 Q The cigarette act, the same law,
14 also prohibited the FTC, as well as the
15 states, from requiring any cautionary
16 statement in advertising until July 1969,
17 correct?

18 A Again --

19 MR. PATRICK: I'm sorry. Restate
20 the question?

21 THE WITNESS: Yeah, there was a
22 preemption.

1 MR. PATRICK: Could you repeat it?

2 THE WITNESS: Could you repeat it?

3 MS. PARKER: Would you like the

4 court reporter to read that back?

5 (The reporter read the record as

6 requested.)

7 MR. PATRICK: I don't know if I

8 understand that either, but I'm going to

9 object.

10 THE WITNESS: Right. Do you have a

11 copy of the Federal Cigarette Labeling and

12 Advertising Act and I can tell if you

13 that's -- if those dates are correct. They

14 did prohibit --

15 BY MS. PARKER:

16 Q They did prohibit it, you're just

17 not certain of the dates?

18 A I'm just not sure of the dates.

19 (Wilkenfeld Deposition Exhibit

20 No. 41 was marked for

21 identification.)

22 BY MS. PARKER:

1 Q Let me show you now what we have
2 marked as Exhibit 41. This is another press
3 release from the Federal Trade Commission and
4 this one is dated 1965, correct?

5 A Yes.

6 Q This FTC press release stated that,
7 "In keeping with congressional directive,"
8 and this is the next to the last paragraph.
9 "In keeping with congressional directive the
10 FTC will continue to monitor cigarette
11 advertising and promotion and take all
12 appropriate action consistent with the
13 labeling act to prohibit advertising that
14 violates the FTC act." Did I read that
15 correctly?

16 A Yes.

17 MS. PARKER: That was in July
18 of 1985. Let me show you now what we're
19 marking as Exhibit 42.

20 (Wilkenfeld Deposition Exhibit
21 No. 42 was marked for
22 identification.)

1 BY MS. PARKER:

2 Q Which is a letter from the FTC in
3 November of 1965 that's addressed to R.J.
4 Reynolds Tobacco Company. Do you see that?

5 A Uh-huh, yes.

6 Q If you will look at the next to the
7 last paragraph on page two, the FTC was
8 asking what action will be -- second page.

9 A I know. I just --

10 Q Take your time.

11 A This is a wonderful history lesson.
12 I mean some of these I've never seen.

13 Q So if you look on the second page,
14 next to the last paragraph, the FTC wrote
15 this letter to Reynolds and asked what action
16 will be taken by you to assure that cigarette
17 advertising will conform to the standards of
18 the Federal Trade Commission Act and will not
19 defeat or frustrate the provisions and
20 objectives of the Cigarette Labeling and
21 Advertising Act." Did I read that correctly?

22 A Yes.

1 Q So at this point in 1965 the FTC
2 was still actively involved to make sure that
3 the cigarette companies complied with
4 advertising regulations, correct?

5 A I couldn't tell from this -- from
6 this how constrained they felt by the actions
7 of congress. I know that they did feel very
8 constrained.

9 Q Well, the FTC was making sure that
10 Reynolds and the other cigarette companies
11 were doing what the government required them
12 to do, right? That's what it says.

13 A The commission sent a letter to
14 Reynolds.

15 Q Saying we want to make sure that
16 you're doing --

17 A Right. Now whether they could or
18 not I can't say.

19 Q Well, my question is, the FTC was
20 trying to make sure that the cigarette
21 companies, and in particular Reynolds, was
22 doing what the Government required them to

1 do, right?

2 A The commission sent this letter to
3 Reynolds. That's -- that's as much as I can
4 see.

5 Q Shortly afterwards in 1969 congress
6 banned cigarette advertising on television
7 and radio, correct?

8 A I thought it was 1970.

9 Q Well, would you agree in either '69
10 or '70 congress banned cigarette advertising
11 on television and radio?

12 A Yes.

13 Q The warning on the packages was
14 strengthened to read that, "Warning: The
15 Surgeon General has determined that cigarette
16 smoking is dangerous to your health." Do you
17 remember that?

18 A Yes.

19 Q This federal law continued to
20 prohibit any other health warning requirement
21 for packages, right?

22 A Yes.

1 MR. PATRICK: Repeat the question.
2 I'm sorry.
3 MS. PARKER: She's already answered
4 it. Do you want it read back?
5 MR. PATRICK: Let the record
6 reflect that I interposed an objection before
7 she answered it.
8 THE WITNESS: I'm too quick. I'm
9 sorry.
10 BY MS. PARKER:
11 Q The act also prohibited the FTC
12 through 1971 from issuing regulations that
13 would require a health warning in cigarette
14 advertising?
15 A My recollection was that they tried
16 another trade regulation rule and congress
17 stepped in in to prevent them again.
18 Q Then in 1985 congress again changed
19 the warning labels, right?
20 A Correct.
21 Q Instead of just one warning
22 congress now mandates four warnings that are

1 rotated, correct?

2 A Correct.

3 Q Those are the warnings that are
4 still in effect today?

5 A Correct, packages and advertising.

6 Q We've spent some time now going
7 over from 1940s, 1950s, 1960s and forward
8 some of the FTC's actions.

9 A You missed one.

10 Q What is that?

11 A In -- the FTC sued the cigarette
12 companies in '79 -- I think it's '79 -- to
13 put the warning labels in advertisements and
14 the major cigarette companies entered a
15 consent judgment with the Federal Trade
16 Commission to put those warning labels in
17 advertising and that was enforced in the U.S.
18 District Court, Southern District of New York
19 in 1981. I may have my dates wrong.

20 (Wilkenfeld Deposition Exhibit
21 No. 43 was marked for
22 identification.)

1 BY MS. PARKER:

2 Q I think we're up to Exhibit 43. Is
3 this what you're referencing?

4 A '72. I was off by seven years.

5 Q Is that what you're referencing?

6 A Yes, this is what I'm referencing.

7 Q We need to change the tape, so we
8 need to go off the record for a moment.

9 THE VIDEOGRAPHER: 4:30 p.m. off
10 the record.

11 (Discussion off the record)

12 THE VIDEOGRAPHER: 4:31 back on the
13 record.

14 BY MS. PARKER:

15 Q Exhibit 43 that we've marked is the
16 consent order that you referenced; is that
17 correct?

18 A Yes, it's 1972.

19 Q In 1972 the FTC was still working
20 to make sure that the cigarette companies
21 complied with the Government requirements,
22 right?

1 A Yes.

2 Q Again, in 1972 the tobacco
3 companies were doing what the Government told
4 them to do, right?

5 A They were doing what the Government
6 told them to do.

7 Q Since the mid 1950s forward there
8 have been no advertisement for low tar, low
9 nicotine cigarettes that explicitly stated
10 that low tar, low nicotine cigarettes are
11 safer or healthier; is that correct?

12 A I can't offer an -- I haven't seen
13 all of the ads.

14 Q Well, I'm asking to your knowledge.
15 To your knowledge sitting here today, have
16 you ever seen an ad from the 1950s forward
17 any ad for low tar, low nicotine cigarettes
18 that explicitly stated that low tar, low
19 nicotine cigarettes are safer or healthier?

20 MR. PATRICK: Objection.

21 THE WITNESS: I couldn't say no
22 because I think I have seen some that I

1 thought were pretty explicit.

2 BY MS. PARKER:

3 Q Can you identify those?

4 A No.

5 Q Why not?

6 A That wasn't what I was called here
7 to do, so I don't have, you know, the whole
8 history of tobacco advertising.

9 Q

10 A I saw some ads that were submitted
11 to the Institute of Medicine by John Slade
12 recently that I thought were pretty explicit.
13 He presented those a week or two --

14 Q Which ads were those?

15 A You know, I'd have to go back and
16 look at his -- his presentation. I don't
17 have it.

18 Q Which brands?

19 A I don't know.

20 Q Which companies?

21 A I don't know that either. He had
22 examples from lots of different companies

1 over a long period of time. He had ads that
2 I had never seen before.

3 Q Your testimony is that those are
4 ads that have explicit --

5 A As I say, that -- that's my
6 recollection, is that they were fairly
7 explicit.

8 Q You're going to need to let me
9 finish my question. The court reporter has
10 already asked you once about that.

11 A Okay.

12 Q The only explicit health
13 information in advertisements would be the
14 warnings, wouldn't it?

15 MR. PATRICK: Objection.

16 THE WITNESS: The only --

17 BY MS. PARKER:

18 Q Explicit health information on
19 advertisements for low tar, low nicotine
20 cigarettes are the warnings?

21 A No, I've seen explicit information
22 that's not just the warnings.

1 Q Is that the examples that you just
2 referenced that John Slade had?

3 A You know, again, I don't have the
4 ads with me. I didn't know I was going to be
5 questioned about that. But I've seen ads in
6 which doctors appeared and talked about --
7 about throat irritation and talked about --

8 Q Let me interrupt you.

9 MR. PATRICK: Wait a minute. You
10 know, I object to your interrupting her
11 answer and I think she should finish if you
12 need toot.

13 BY MS. PARKER:

14 Q I asked you about since the
15 mid 1950s, if that will help you any. Since
16 the mid 1950s.

17 A That's my answer, that I think I
18 have seen ads in which health time claims
19 have been made.

20 Q But you're not going to testify
21 about those issues in the little case?

22 A That's correct.

1 Q You've not done any type of
2 comprehensive study of advertisements for low
3 tar, low nicotine cigarettes; is that
4 correct?

5 A That's correct.

6 Q Now, the warning labels have
7 appeared on the packages of cigarettes
8 since 1966, correct?

9 A Is that -- let's see. They passed
10 in '64. Effective January '66.

11 Q Those warning labels are part of
12 the information that consumers receive,
13 correct?

14 A A very small part.

15 Q I move to strike that response.

16 My question is, warning labels are
17 a part of the information that consumers
18 receive, correct?

19 MR. PATRICK: Objection. Asked and
20 answered.

21 BY MS. PARKER:

22 Q You can answer my question.

1 A I have to say a very small part.
2 They're -- they're inconspicuously on the
3 side of the package and in many cases they're
4 in -- in colors that are not very
5 contrasting, but -- so it's a small part of
6 the information that consumers receive.

7 Q You're a lawyer?

8 A I'm a lawyer, yes, right.

9 Q You understand preemption, don't
10 you?

11 A Well, if you mean the federal
12 preemption and the Federal Cigarette Labeling
13 Act --

14 Q Yes. Do you understand it?

15 A Well, better minds than mine have
16 had trouble with it, but I understand the
17 arguments.

18 Q Do you understand that any suits
19 that would raise issues along the lines of
20 what you've just mentioned are preempted
21 under the labeling act? Do you have an
22 understanding?

1 MR. PATRICK: Which one?

2 THE WITNESS: Yeah, I don't think I
3 would want to comment on that. I mean
4 that -- I'd have to go back and read triple
5 O.

6 BY MS. PARKER:

7 Q Now, the FTC has said that lower
8 yield products are safer; isn't that correct?

9 A The FTC?

10 Q The FTC has said that lower yield
11 products are safer?

12 A Some of the documents that you
13 showed me from -- from a long time ago seem
14 to say that, yes. I don't think they say
15 that now. I don't know what they say now
16 actually.

17 MS. PARKER: Let me show you
18 Exhibit 44.

19 (Wilkenfeld Deposition Exhibit
20 No. 44 was marked for
21 identification.)

22 BY MS. PARKER:

1 Q This is a Federal Trade Commission
2 report to congress for the year 1978 and I
3 want to bring your attention to page three of
4 the report. Again, this is a report that the
5 FTC made to congress and it states, this is
6 the paragraph next to the end, "There is
7 evidence suggesting that cigarettes with a
8 lower tar and nicotine are less hazardous."
9 Do you see is that?

10 A "While there is evidence suggesting
11 that cigarettes with lower tar and nicotine
12 are less hazardous, the evidence is not
13 conclusive." So I don't think that's a --
14 that's a wholesale endorsement. I think what
15 it says -- I think it describes what the FTC
16 thought the evidence at that time was.

17 Q At that time in 1978 the FTC told
18 congress that there is evidence suggesting
19 that cigarettes with lower tar and nicotine
20 are less hazardous, correct?

21 A Although the evidence is not
22 conclusive.

1 Q Correct?

2 A Correct.

3 MS. PARKER: Let me show you now

4 what we're marking as Exhibit 45.

5 (Wilkenfeld Deposition Exhibit

6 No. 45 was marked for

7 identification.)

8 BY MS. PARKER:

9 Q Exhibit 45 is a public version of
10 the Federal Trade Commission staff report on
11 the cigarette advertising investigation,
12 correct?

13 A Yes.

14 Q That's from 1981?

15 A Correct.

16 Q Let me bring your attention to
17 page 1-49 at the top of the page.

18 A Yes.

19 Q Do you see that?

20 It says, "Since the issuance of
21 the 1964 Surgeon General's report the average
22 tar and nicotine content of cigarettes has

1 declined. This decline was encouraged by
2 the 1966 public health service announcement
3 that the preponderance of scientific evidence
4 strongly suggests that the lower the tar and
5 nicotine content of a cigarette the less
6 harmful will be the effect."

7 A Correct.

8 Q Do you see that?

9 A Yes.

10 Q The FTC also issued a policy
11 statement taking that position, correct?
12 That's what it says there?

13 A Yeah, it says that. It says that
14 there, yeah.

15 Q If you look on over to the next
16 page, which is page 1-51, under number two,
17 didn't this same 1981 FTC staff report state
18 the belief of the Surgeon General and the FTC
19 at that time that smoking lower yields of tar
20 and nicotine reduces the risk of lung cancer
21 and to some extent improves the smoker's
22 chance for a longer life. Do you see that?

1 MR. PATRICK: Objection.

2 THE WITNESS: "Provided there is no
3 compensatory increase in the amount smoked."

4 BY MS. PARKER:

5 Q Right. Do you see that?

6 A Yes.

7 Q Did I read that correctly?

8 A You left out the qualifier, which
9 is very important in this case. In 1981 the
10 Surgeon General was beginning to change his
11 mind based on the evidence that they were
12 seeing.

13 Q Let's make sure you and I are
14 correct about this. In 1981 the Federal
15 Trade Commission staff report says that in
16 some circumstances smoking lower yields of
17 tar and nicotine reduces the risk of long
18 cancer and to some extent improves the
19 smoker's chance for a longer life, correct?

20 A With the rest of the sentence.

21 Q That's correct.

22 A "Provided there is no compensatory

1 increase in the amount smoked." You know,
2 I'd have to see the rest of the -- the report
3 because this was a period of great change.

4 Q Have you seen this report prior to
5 today?

6 A Absolutely.

7 Q Yes?

8 A Yes.

9 Q Did you participate in the
10 preparation of the report?

11 A No, no.

12 Q In 1985 in Mr. Calfee's report,
13 Mr. Calfee at the FTC stated that the
14 benefits of lower tar are, generally, granted
15 with respect to certain forms of cancer,
16 including lung cancer, didn't he?

17 A He did, but that would certainly
18 have been one of the things I would have had
19 problems with.

20 Q Well, that's not my question.

21 A Yes. Did he? I don't know
22 where --

1 Q Look at page 42.

2 A Okay.

3 Q Do you see the last full sentence
4 on page 42? It says, "25 years after the tar
5 and nicotine ban the benefits of lower tar
6 are, generally, granted only with respect to
7 certain forms of cancer including lung
8 cancer." Do you see that?

9 A Yes.

10 Q He cites a number of studies there
11 in footnote 153 on that same page, correct?

12 A Correct.

13 Q Are you familiar with the name
14 Joseph Mulholland?

15 A Yes.

16 Q Do you know Mr. Mulholland?

17 A Yes.

18 Q He worked at the FTC during the
19 same period of time you were there, correct?

20 A Yes, he's still there I think.

21 Q He wrote a report in 1989 entitled,
22 "The Effect of Advertising on the Level and

1 Composition of Cigarette Consumption,"
2 correct?

3 A He wrote a lot of reports. I'd
4 have to see it.

5 MS. PARKER: Well, let me show you
6 Exhibit 46.

7 (Wilkenfeld Deposition Exhibit
8 No. 46 was marked for
9 identification.)

10 BY MS. PARKER:

11 Q This is Mr. Mulholland's report
12 that's dated November 13, 1989 on the first
13 page?

14 A Uh-huh.

15 MR. PATRICK: Let me just object to
16 the use of this. This is only two pages out
17 of a report that's at least --

18 THE WITNESS: Joe Mulholland and I
19 had a long --

20 MR. PATRICK: Hold on. It's at
21 least 87 pages long.

22 BY MS. PARKER:

1 Q Well, I have a copy of the entire
2 report if you would like to look at that.
3 Let me ask you on page 83
4 Mr. Mulholland wrote, in the middle of the
5 page, that, "The likely health gains from the
6 promotion of less hazardous cigarettes
7 outweigh their potential costs." Isn't that
8 what he wrote?
9 A I'd like to see the full report.
10 Q While we're getting the report can
11 you answer that question? That's what it
12 says there on page 83, correct?
13 A It said --
14 Q Middle of the page. "The likely
15 health gains from the promotion of less
16 hazardous cigarettes outweighs their
17 potential costs."
18 A That's what Joe said there.
19 Q If you'll look over on page 87, the
20 first full paragraph, about middle way of the
21 paragraph, do you see that?
22 A "The conclusion that advertising

1 probably does not have a large demand"?

2 Q Do you see that?

3 A Uh-huh.

4 Q Mr. Mulholland concluded in this
5 report that cigarette advertising itself may
6 at times contribute to the negative image of
7 its product through the federally-mandated
8 health warnings that must accompany each ad
9 and through the emphasis placed on the toxic
10 elements of smoke in advertisements for low
11 tar cigarettes. Do you see that? Did I read
12 that correctly?

13 A Yes.

14 Q It goes on and says, "The continued
15 decline in smoking levels, despite increasing
16 levels of cigarette advertising expenditures,
17 is consistent with the view that advertising
18 has been relatively ineffectual in
19 stimulating aggregate cigarette demand." Did
20 I read that correctly?

21 A That's certainly what Joe said.

22 Q So at least since the 1970s the FTC

1 has consistently stated that low yield tar
2 and nicotine cigarettes presents fewer health
3 risk than higher-yield products; isn't that
4 correct?

5 A This is Joe Mulholland's opinion,
6 not the Federal Trade Commission's opinion.

7 Q Well, we went over the report to
8 congress that the FTC made in 1978 that would
9 be a statement by the FTC?

10 A That was, yes.

11 Q The 1981 FTC staff report, that
12 would be a statement by the FTC, wouldn't it?

13 A The 1981 is fairly qualified.

14 Q That's not my question.

15 MR. PATRICK: That's her answer.

16 Objection.

17 BY MS. PARKER:

18 Q My question is, the 1981 FTC staff
19 report is a statement by the FTC, correct?

20 A Actually it had a very funny
21 position. It was the statement of the staff.

22 Q It was the statement of the staff

1 of the FTC?

2 A Right. But I can't tell you that
3 what the -- the part you read was the entire
4 part about low tar because --

5 Q Ms. Wilkenfeld, my question was
6 only that the 1981 FTC staff report was a
7 statement of the FTC.

8 A But this follows your question of
9 what the position of the FTC has been from a
10 period of time. Now, if that question is no
11 longer on the table and if you ask me if that
12 sentence was in the 1981 report, then I can
13 answer that yes, that was in the 1981 report.
14 But if your --

15 Q The 1981 report is a statement of
16 the FTC staff, correct?

17 MR. PATRICK: I would object to
18 your continuing to cut off the witness in the
19 middle of her answer.

20 THE WITNESS: The 1981 report you
21 let me read one small part. It's a whole
22 long report. I don't know how that was

1 qualified in the whole report.

2 BY MS. PARKER:

3 Q Numerous members of the public
4 health community have also advocated lower
5 yield products as safer, correct?

6 A At any particular time frame?

7 Q I'm asking you. At any point in
8 time.

9 A Certainly historically.

10 (Wilkenfeld Deposition Exhibit
11 No. 47 was marked for
12 identification.)

13 BY MS. PARKER:

14 Q Let me show you what we've marked
15 as Exhibit 47.

16 A Can I ask my lawyer a question,
17 please?

18 Q Is it about the document?

19 A Not this document, no.

20 Q You can talk to your lawyer about a
21 particular document, but --

22 A It's only about a document.

1 (Witness conferred with counsel)

2 MR. PATRICK: She would like to,
3 before we continue, to look at the entire
4 Mulholland report that just portions of it
5 were given to the witness.

6 MS. PARKER: There are no questions
7 that are pending on this issue.

8 MR. PATRICK: There are no
9 questions that are pending, but she asked to
10 see the entire report and she may wish to
11 amend some of her answers in the event that
12 there's information that is relevant.

13 THE WITNESS: This was represented
14 to me as being the commission report and
15 there's nothing on this that would indicate
16 that this was a commission report.

17 BY MS. PARKER:

18 Q Mr. Mulholland was at the FTC on
19 November 13th, 1989, correct?

20 A The Bureau of Economics -- the
21 people in the Bureau of Economics are allowed
22 to publish things at conferences which have

1 no approval of the commission.

2 Q That wasn't my question. My
3 question was --

4 A He was at the commission at that
5 time.

6 Q He was there?

7 A But that's not a commission
8 document or at least there's nothing on it
9 that indicates it's a commission document.

10 Q Let me ask you this simple
11 question.

12 A Okay.

13 Q On November 13th, 1989 Joseph
14 Mulholland was an employee of the Federal
15 Trade Commission, correct?

16 A Correct.

17 Q You don't know one way or the other
18 as to whether or not the document, his report
19 that we previously marked, is or is not a
20 statement of the FTC, correct?

21 A Oh, I know -- I know for a fact it
22 isn't.

1 Q So your position is it is not?
2 A It is not.
3 MS. PARKER: Could we take a short
4 break?

5 THE WITNESS: Sure.

6 THE VIDEOGRAPHER: 4:50 p.m. off
7 the record.

8 (Recess)

9 THE VIDEOGRAPHER: 4:56 p.m. back
10 on the record

11 BY MS. PARKER:

12 Q I just gave you what we marked as
13 Exhibit 47, correct?

14 A Yes.

15 Q That's a couple of pages from
16 the 1981 Surgeon General's report, correct?

17 A Yes.

18 Q Let me bring your attention to
19 page 200 of the report, which is the second
20 page that you have. Over on the first column
21 on the left down toward the bottom of the
22 page there's a quote. Do you see that?

1 A Yes.

2 Q That says, "In 1966 Public Health
3 Service concluded," and then I'm going to
4 read the quote, "the preponderance of
5 scientific evidence strongly suggests that
6 the lower the tar and nicotine content of
7 cigarette smoke the less harmful it would be
8 the effect." Do you see that?

9 A Yes.

10 Q Did I read that correctly?

11 A Yes.

12 Q Are you familiar with professor
13 Joel Cohen?

14 A Yes.

15 Q He's an anti-tobacco advocate?

16 A He's a professor of consumer
17 psychology at the University of Florida in
18 Gainesville.

19 Q Would you consider him an
20 anti-tobacco advocate?

21 A No, I consider him an expert
22 witness.

1 Q On what issues?

2 A Consumer psychology.
3 (Wilkenfeld Deposition Exhibit
4 No. 48 was marked for
5 identification.)

6 BY MS. PARKER:

7 Q Let me show you a copy of his study
8 that we've marked as Exhibit 48. This is his
9 study from January 1996 in the American
10 Journal of Public Health, correct?

11 A Yes.

12 Q Have you seen this article prior to
13 today?

14 A Yes.

15 Q Let me ask you look at page two of
16 the article over in the first column on the
17 left, first full paragraph. Do you see that?
18 Toward the end of the paragraph it says,
19 "There seemed to be widespread agreement,"
20 and, again, this is referring to 1967, "that
21 reduction in yields are associated with a
22 lessening of health risk." Do you see that?

1 A I must be in the wrong paragraph.
2 Q First full paragraph at the end of
3 the paragraph. It's before number one. It
4 says, "There seemed to be widespread
5 agreement that." Do you see that?
6 A The first full paragraph.
7 Q The one that begins, "The FTC next
8 to established."
9 A Yes.
10 Q At the end of that paragraph
11 there's a sentence that has a one and a two
12 in it.
13 MR. PATRICK: It actually begins
14 with "Despite."
15 THE WITNESS: Thank you.
16 BY MS. PARKER:
17 Q Do you see that? "There seemed to
18 be widespread agreement that, number two,
19 reductions in yields are associated with a
20 lessening of health risk." Do you see that?
21 A Correct.
22 Q Did I read that correctly?

1 A That's part of a sentence.

2 Q Did I read that part of the
3 sentence correctly?

4 A You read that part of the sentence
5 correctly.

6 Q That's referring to 1967, correct?
7 It talks about when the FTC laboratory was
8 established?

9 A It appears to be -- appears to be
10 that.

11 (Wilkenfeld Deposition Exhibit
12 No. 49 was marked for
13 identification.)

14 BY MS. PARKER:

15 Q Let me show you now Exhibit 49.
16 This is an article by Elson and Betts in the
17 Journal of the National Cancer Institute
18 from 1972, correct?

19 A June of '72, yes.

20 Q Let me ask you to look at page 1889
21 of the article. In the right-hand column,
22 the last two paragraphs on that column, the

1 next to the last paragraph begins, "It may
2 not be." Do you see that?

3 A Yes.

4 Q Let me read the second sentence.
5 "Obviously reduction of tar and nicotine
6 content of the smoke either by modification
7 of the tobacco or by the use of suitable
8 filters is of paramount importance." Did I
9 read that correctly?

10 A You read that correctly.

11 MR. PATRICK: Let me object to the
12 use of this document. This is a medical
13 article and I think it's inappropriate with
14 this witness.

15 THE WITNESS: I wanted to say I
16 have no idea who these people are.

17 MS. PARKER: Well, I think -- okay.

18 THE WITNESS: Nor what the topic --
19 the topic of the article is. I mean --

20 BY MS. PARKER:

21 Q You're familiar with the Journal of
22 the National Cancer Institute, aren't you?

1 A Yes.

2 Q That is a well-respected journal,
3 correct?

4 A It's not my field. I mean it's --
5 it's the Journal of the National Cancer
6 Institute. I don't know what their peer
7 review -- let me just say what you read you
8 read correctly.

9 Q The Journal of the National Cancer
10 Institute is a publicly-available journal,
11 correct?

12 A Yes. Actually I recently looked at
13 the question of what the Journal of the
14 National Cancer Institute was and I know it
15 has had different iterations over time and at
16 one point it was an organ of -- of the agency
17 and at other times it was privately
18 published. I don't know what it was in 1972.

19 Q Regardless of how it was published,
20 it's always been publicly available?

21 A Yes.

22 Q Now, you've already told me this

1 morning you that you consider Dr. Ernst
2 Wyinder an authority on smoking and health
3 issues. Do you remember when I asked you
4 about him?

5 A Yes. I considered him. He's
6 that --

7 Q Right. Didn't Dr. Wyinder advocate
8 low tar in cigarettes?

9 A He certainly took the position that
10 the less tar that a consumer ingests the
11 better.

12 Q Didn't Dr. Wyinder also advocate
13 filters on cigarettes?

14 A He might have. I can't be sure of
15 every single one of his opinions. I mean I'm
16 not prepared to tell you what Ernst Wyinder
17 said on any given subject.

18 Q Dr. Wyinder also encouraged
19 manufacturers of cigarettes to produce
20 cigarettes with lower tar and nicotine
21 yields?

22 A Again, I can't tell you to my

1 knowledge what he recommended.

2 Q Dr. Wyinder's statements were
3 conveyed to the general public through the
4 media, weren't they?

5 MR. PATRICK: Objection. There's
6 no basis.

7 THE WITNESS: Again, I don't know.

8 BY MS. PARKER:

9 Q Have you ever seen any articles
10 about Dr. Wyinder?

11 A I knew Dr. Wyinder professionally
12 and I worked with him on a number of panels.
13 I don't know what of his I have seen in
14 public press. I mean I've seen -- seen him
15 in scientific circles.

16 Q So you're not familiar with
17 articles, for example, in the Reader's Digest
18 setting forth Dr. Wyinder's views advocating
19 low tar, low nicotine cigarettes?

20 A That's correct, I'm not. I'm not
21 sure I've ever read anything in Reader's
22 Digest.

1 MS. PARKER: Let me mark now our
2 next exhibit, which is Number 50.
3 (Wilkenfeld Deposition Exhibit
4 No. 50 was marked for
5 identification.)

6 BY MS. PARKER:

7 Q That's titled, "Less Harmful Ways
8 of Smoking: A workshop of the Second World
9 Conference on Smoking and Health Held in
10 London, England, September 20
11 through 24, 1971." Do you see that?

12 A Yes.

13 Q It says that the workshop chairman
14 and editor was Dr. Wyinder, correct, at the
15 bottom of the first page?

16 A Yes.

17 Q The co-editor was Dr. Hoffman,
18 correct?

19 A Correct.

20 Q Are you familiar with this
21 workshop?

22 A No.

1 Q Have you ever heard of it before?

2 A No.

3 Q Let me ask you to look at
4 page 1762. The very top of the page up in
5 the left-hand column it says, "These studies
6 give unequivocal proof in man that reduced
7 tar and nicotine provide a first model of a
8 less hazardous cigarette." Do you see that?

9 A I see that.

10 Q If you'll look over further, the
11 next page, which are recommendations, number
12 two in the middle of the page it says, "The
13 manufacturer should be encouraged to produce
14 cigarettes with increasingly lower tar and
15 nicotine yields." Do you see that?

16 A Yes.

17 Q Wouldn't you agree that the Surgeon
18 General's pronouncements over the years have
19 contributed to the public's knowledge about
20 the health risk of smoking?

21 MR. PATRICK: Objection.

22 THE WITNESS: Are we talking in

1 general?

2 BY MS. PARKER:

3 Q Yes, I'll ask you first in general.

4 A In general, yes.

5 (Wilkenfeld Deposition Exhibit
6 No. 51 was marked for
7 identification.)

8 BY MS. PARKER:

9 Q Let me show you now part of
10 the 1979 Surgeon General's report and we just
11 marked that as Exhibit 51.

12 Let me ask you to look at page 108
13 at the very first paragraph under the heading
14 "Tar," the last sentence there, it says, "As
15 long as warnings of health hazards from
16 smoking are disregarded and as long as
17 cigarettes are consumed, efforts toward a
18 reduction of tar and smoke components, which
19 may contribute to these health hazards,
20 should be continued." That's what it says,
21 correct?

22 A That's what it says.

1 Q Are you familiar with Dr. Cyler
2 Hammond?
3 A I've heard his name.
4 Q Have you ever met him?
5 A No.
6 Q Do you consider Dr. Hammond a
7 reliable authority on smoking and health
8 issues?
9 A I can't offer an opinion.
10 Q You just don't know one way or the
11 other?
12 A Correct.
13 Q Let me show you now what we've
14 marked --
15 A Can I say that the sentence you
16 read is modified by the first sentence in
17 that paragraph?
18 Q What sentence are you referring to?
19 A "In the experimental setting a dose
20 response has been established between tar
21 application or smoke inhaled in tumor
22 yields."

1 Q Then it goes on to say, "Thus, as
2 long as warnings of health hazards from
3 smoking are disregarded and as long as
4 cigarettes are consumed, efforts towards a
5 reduction of tar and smoke components which
6 may contribute to these health hazards should
7 be continued"?

8 A Yes, it's modified -- it's modified
9 by the dose response notion.

10 (Wilkenfeld Deposition Exhibit
11 No. 52 was marked for
12 identification.)

13 BY MS. PARKER:

14 Q Let me show you what we've marked
15 now as Exhibit 52. Are you familiar with the
16 Banbury report?

17 A I've seen it.

18 Q That was from 1980, correct?

19 A Correct, it was before I was
20 involved in tobacco.

21 Q I've attached a couple of pages.
22 If you could turn to page 13, please. The

1 title there says, "The Long-Term Benefits of
2 Reducing Tar and Nicotine in Cigarettes." Do
3 you see that?

4 A Yes.

5 Q It says it's written by
6 Dr. Hammond, correct?

7 A Correct.

8 Q He is with the American Cancer
9 Society, right?

10 A That's what it says, yes.

11 Q Dr. Hammond in this article there
12 in the first and second paragraph says that,
13 in referring to a statement on lower tar and
14 nicotine cigarettes he made in 1967, he says,
15 "This statement has been relevant ever since.
16 Today I would change this wording. Instead
17 of saying that the preponderance of
18 scientific evidence strongly suggests I now
19 say the preponderance of scientific evidence
20 very strongly suggests and I'd leave the rest
21 of the wording unchanged."

22 And the earlier statement he was

1 referring to is that the preponderance of the
2 scientific evidence strongly suggests that
3 the lower tar and nicotine content in
4 cigarettes the less harmful would be the
5 effects; is that correct?

6 A That's what -- that's what this
7 article says.

8 Q So Dr. Hammond, of the American
9 Cancer Society stated there in 1980 that
10 lower tar and nicotine in cigarettes are less
11 harmful, correct? It's 1980 on the first
12 page.

13 A The low --

14 MR. PATRICK: I will object to this
15 document, but you can answer.

16 THE WITNESS: The lower the tar and
17 nicotine content in cigarettes the less
18 harmful would be the effects.

19 Could you repeat the question?

20 (The reporter read the record as
21 requested.)

22 THE WITNESS: This article says in

1 the first two paragraphs that the lower the
2 tar and nicotine content in cigarettes the
3 less harmful would be the effect.

4 (Wilkenfeld Deposition Exhibit
5 No. 53 was marked for
6 identification.)

7 BY MS. PARKER:

8 Q Let me show you now the next
9 exhibit. I believe we're up to Number 53.
10 This is a portion of the 1981 Surgeon
11 General's report. Ask you if you will to
12 look at page 18 under paragraph numbered one
13 under the word "Cancer."

14 This 1981 Surgeon General's report
15 states that, "The studies seem to show that
16 smoking filtered lower tar cigarettes reduces
17 the risk of lung cancer as compared with
18 smoking unfiltered higher tar cigarettes";
19 isn't that correct?

20 A You're talking about paragraph one?

21 Q Well. Yes, for the whole report,
22 but specifically paragraph one. The Surgeon

1 General report in 1981 stated that studies
2 seem to show that smoking filtered lower tar
3 cigarettes reduced the risk of lung cancer as
4 compared with smoking unfiltered higher tar
5 cigarettes; isn't that correct?

6 A If you're asking if that's what it
7 says here, yes, but you suggested that -- the
8 entire report. I don't have the entire
9 report and I know from reviewing Surgeon
10 General's reports that when you get to the
11 conclusions, a lot of the qualifications are
12 gone by then. So this statement here is
13 exactly what you said.

14 Q Paragraph number one there says,
15 "Today's filter tipped lower tar and nicotine
16 cigarettes produce lower rates of lung cancer
17 than do their higher tar and nicotine
18 predecessors."

19 A Correct.

20 Q We've previously marked the Lancet
21 article on the Scarborough conference this
22 morning, and that's Exhibit 8 that you have

1 there. Do you have that from this morning?

2 A Yes.

3 Q That's the conference held in

4 London in 1985 that you attended?

5 A No, Scarborough is in Maine.

6 Q Oh, I'm sorry. In 1985, right?

7 A No, it was held in 1983. It was
8 published in 1985.

9 Q Published in 1985.

10 A Right.

11 Q Attended it?

12 A In 1983, yes.

13 Q The members at that conference
14 reviewed all of the available information on
15 low tar, low nicotine cigarettes, correct?

16 A Each person brought their own
17 expertise to the conference.

18 Q Brought yours?

19 A Correct, which was on Barclay
20 cigarettes.

21 Q Let me bring your attention to the
22 second page, which is actually page 1112 of

1 the article. If you'll look there in the
2 right-hand column toward the bottom, the
3 paragraph that begins, "The importance of
4 compensatory smoking." Do you see that?

5 A Yes.

6 Q Let me read the sentence and ask
7 you if I've read it correctly. "Concerns
8 that a lower tar policy will encourage
9 smoking do not seem to be well grounded and
10 in tar reduction programs may actually help
11 people to give up smoking. In both the U.S.
12 and the U.K., which have active tar reduction
13 programs, there have been notable reductions
14 in general smoking rates and cigarette
15 consumption." Did I read that correctly?

16 A Yes.

17 Q The conference also said that the
18 policy adopted in many countries like the
19 United States to encourage decline in
20 cigarette tar yields has been beneficial and
21 that the tar yields should be even further
22 reduced?

1 A Can you tell me where that is?

2 Q Well, I'm not reading a quote. I'm
3 just asking you isn't that what --

4 A I'd have to read it again to see if
5 that's -- I mean this was a contentious
6 issue. I mean the conclusion was that the
7 future for -- that there was a future for
8 lower tar cigarettes, but the aim should be
9 to reduce the yield of other smoke components
10 as well as the tar and that there needed to
11 be biochemical marking as well as machine
12 marking and that the public needed to be made
13 aware of the uncertainties of the policy
14 because of compensatory smoking. So it was
15 highly qualified.

16 Q The conference report concluded
17 that cigarettes yielding less tar will be
18 less likely to cause lung cancer, correct?
19 Look on page one under the summary. It says,
20 "The consensus was that the policy had been
21 beneficial and that tar yields should be
22 further reduced" and it references that the

1 benefit was a reduction in lung cancer in
2 that same paragraph.

3 A That's the implication.

4 Q Well, that's what it says?

5 A Well, it says, "The public needs to
6 be made aware of the uncertainties of the
7 policy with respect to the effects of the
8 risk of disease other than lung cancer and
9 that the benefits from smoking lower yield
10 cigarettes," et cetera.

11 Q It says in the second sentence
12 there, "The consensus was that the policy,"
13 and that's reduction in tar yields, "has been
14 beneficial"?

15 A Right, but you said vis-a-vis lung
16 cancer and I was just saying --

17 Q It references lung cancer down
18 further in the paragraph?

19 A Yes.

20 Q Has the FTC every given guidance,
21 for example, through all these press
22 releases, has the FTC ever given guidance on

1 smokers on how to smoke?

2 A In their last federal register
3 notice they said they were going to do
4 something, put out bookmarks or something. I
5 don't know if they did. But it would have
6 been very recently.

7 Q Well, while you were at the FTC did
8 the FTC ever give guidance to smokers on how
9 to smoke?

10 A Do you want a yes or no or --

11 Q Yes. Did they or did they not?

12 A The Federal Trade Commission did
13 not.

14 Q Looking again at the same exhibit,
15 the Lancet article that we've marked as
16 Exhibit 8, on page three of it, which is
17 page 1113, the conference references consumer
18 advisories regarding compensatory smoking.
19 Do you see that, the very last sentence on
20 that page? "At the same time as the
21 lower-yield approach is pursued, governments
22 should make smokers more aware of the reality

1 and potential risk of compensatory smoking."

2 A Yes, and we designed them.

3 Q Pardon?

4 A Yes, and we designed them and
5 recommended that they be published.

6 Q The FTC never did that?

7 A That's right, the -- the bureau
8 director of the Bureau of Consumer Protection
9 said that the Federal Trade Commission was
10 not a public health agency and should not be
11 in the business of giving public health
12 information.

13 Q What was the name of that person
14 who said --

15 A 1983. It was -- I'd have to go and
16 check who was -- who was occupying that
17 office at the time. Probably came through
18 the -- probably came through the policy
19 planning group.

20 Q Was this person an honorable
21 person?

22 MR. PATRICK: Objection.

1 THE WITNESS: Was this person an
2 honorable person. Not everybody at the
3 Federal Trade Commission was an honorable
4 person. I can't say. I don't think it was
5 an honorable decision.

6 BY MS. PARKER:

7 Q Was this a recommendation that you
8 made, to give smokers consumer information
9 about how to smoke?

10 A It was a recommendation that I made
11 and that was forwarded by the associate
12 director of advertising practices, so it had
13 the support of the associate director.

14 Q Who was that?

15 A Probably Wally Synder. I'd have to
16 check the years and see when -- when -- wait
17 a minute. It would have been Wally Snyder I
18 think.

19 Q But your recommendation was
20 rejected?

21 A It was definitely rejected.

22 Q Do you know why?

1 A The stated reason was that we were
2 not a public health agency and that we
3 didn't -- that we didn't have the
4 responsibility to give consumers health
5 information.

6 Q Well, did you go to some other
7 Government agency and say hey, you need to
8 give guidance to smokers on how to smoke?

9 A Yes.

10 Q Who did you go to?

11 A I talked informally with the folks
12 at the Office on Smoking and Health and I'd
13 have to check the dates to see who was the
14 head at that time because it was changing
15 rather dramatically. I think that was the
16 only people we spoke to.

17 Q They also rejected your
18 recommendation?

19 A It wasn't a recommendation.

20 Q Well, they didn't follow through?

21 A They did not do it.

22 Q Do you know why not?

1 A I didn't make a formal
2 recommendation.
3 Q Well, do you know why they didn't
4 follow your informal recommendation?
5 A No.
6 Q Well, if they have thought very
7 much of the idea, they would have done
8 something, wouldn't they?
9 MR. PATRICK: Objection.
10 THE WITNESS: No, actually there
11 was a lot of politics at that time.
12 BY MS. PARKER:
13 Q What do you mean by that?
14 A What do I mean by that? There was
15 definitely differences of opinion about --
16 about consumer sovereignty and type of
17 information that consumers should get.
18 Q It's a difference of opinion?
19 A Uh-huh.
20 Q Is the Office of Smoking and Health
21 an honorable organization?
22 MR. PATRICK: Objection.

1 THE WITNESS: Organizations don't
2 have honor. They just -- they just --

3 BY MS. PARKER:

4 Q Is the person at the Office of
5 Smoking and Health who rejected your informal
6 recommendation an honorable person?

7 MR. PATRICK: Objection.

8 THE WITNESS: I don't see where
9 honorable -- I don't know what that means in
10 this context. You know, if it means did the
11 person do what they themselves believed
12 should have been done, no, I think that they
13 believed that they should have done something
14 but they didn't because they would not have
15 gotten that recommendation through their --
16 their superiors. So if that's dishonorable,
17 then it's dishonorable.

18 BY MS. PARKER:

19 Q Isn't it true that disclosing low
20 yield tar and nicotine numbers of cigarettes
21 may help some smokers quit?

22 A There was a theory that nicotine

1 fading assisted some smokers in quitting,
2 which is that if you switched down, you might
3 could find it easier to quit.

4 The current review that's going on
5 in California is looking at two enormous data
6 sets from the AC -- the American Cancer
7 Society which will look at that question.
8 The last data set that I saw at the -- and I
9 think it came out at the time of this -- the
10 NCI report, was that, in fact, more people
11 quit who were high tar smokers than were low
12 tar smokers.

13 I don't know if that data will hold
14 up over time, so I can just say that it was a
15 theory that doctors did recommend that but
16 that the data that was -- that was available
17 at one time would have indicated that it
18 didn't -- that it didn't work.

19 Q You didn't answer my question. If
20 you could listen, please, to my question.

21 Isn't it true that disclosing low
22 tar and nicotine numbers on cigarettes may

1 help some smokers quit?
2 MR. PATRICK: Objection.
3 THE WITNESS: The disclosures.
4 BY MS. PARKER:
5 Q The numbers.
6 A The simple disclosure.
7 Q Telling them the low yield numbers.
8 A A qualified no.
9 Q Well, didn't Mr. Calfee conclude to
10 the contrary?
11 MR. PATRICK: Objection. You can
12 answer.
13 THE WITNESS: I haven't read all of
14 Mr. Calfee's documents now. Mr. Calfee and I
15 didn't agree on a lot of things. He did -- I
16 think he did conclude that -- oh, did he
17 conclude that that helped them quit? No, I
18 think he concluded that it caused the numbers
19 to drop. I don't know what he said about
20 quitting. If you can refer me to a page.
21 BY MS. PARKER:
22 Q You don't know what Mr. Calfee's

1 view is on the issue?

2 A On whether people quit? That would
3 have been a numerical answer and -- and I
4 don't -- I don't know if he -- if he
5 addressed that issue.

6 Q Have you ever believed it to be
7 true that disclosing tar and nicotine numbers
8 for low yield cigarettes might help some
9 smokers quit?

10 MR. PATRICK: Objection. Asked and
11 answered.

12 MS. PARKER: It's a different
13 question.

14 BY MS. PARKER:

15 Q Have you ever believed that?

16 A I know -- I know, but you've asked
17 me whether the disclosure as opposed to the
18 usage of those numbers and I don't think
19 disclosure produces anything. So if you're
20 asking me the -- the disclosure of the number
21 produced the consequence, I'd have to say no.

22 Q There is no evidence or empirical

1 study that proves that low tar and nicotine
2 cigarettes prevent people from quitting,
3 correct?

4 A Prevent people from quitting.
5 Probably not.

6 Q Are you familiar with the Froggatt
7 reports?

8 A The who?

9 Q F-r-o-g-g-a-t-t.

10 A No.

11 Q From England?

12 A No.

13 Q They are the British equivalent to
14 the Surgeon General's reports. Have you ever
15 heard of those?

16 A Froggatt?

17 MS. PARKER: I'll let you see this,
18 Exhibit 54.

19 (Wilkenfeld Deposition Exhibit
20 No. 54 was marked for
21 identification.)

22 BY MS. PARKER:

1 Q Have you ever seen this document or
2 a similar document before?

3 A No.

4 Q This first one is dated 1988,
5 correct?

6 MR. PATRICK: Well, I'm going to
7 object to the use of this document. You
8 know, she's never seen it. It's a medical
9 document. It's from Great Britain. But you
10 can proceed.

11 THE WITNESS: I see 1988 in this
12 corner. I don't -- it doesn't have it
13 anywhere else. I presume it's 1988, but --

14 BY MS. PARKER:

15 Q Let me ask you to look at page 17,
16 at the top of the page under number 53. Do
17 you see that? It starts, "We conclude." Do
18 you see that?

19 A Uh-huh.

20 Q "We conclude, therefore, that
21 smoking lower tar cigarettes confers a
22 reduced risk of lung cancer than does the

1 smoking of cigarettes with the relatively
2 high yields that were customary 25 or more
3 years ago. Direct epidemiological evidence
4 and the secular changes in smoking behaviors
5 and lung cancer rates are consistent. While
6 there is uncertainty over the magnitude of
7 the benefit, some studies have shown that
8 reductions in the risk of lung cancer from 20
9 to 40 percent may arise as a result of
10 reductions in tar yield of about 50 percent."
11 Did I read that correctly?

12 A Yes. Do you know if they're
13 talking about the United States or the United
14 Kingdom?

15 Q The study is from the United
16 Kingdom. Now, you're familiar with the 1989
17 Surgeon General's report, correct?

18 A Yes.

19 Q You, in fact, contributed to the
20 preparation of part of that report, correct?

21 A I reviewed it. I didn't contribute
22 anything. I contributed editorial.

1 Q You gave comments on it?

2 A Yes.

3 Q So you've already seen that
4 document?

5 A I saw that document last in
6 about 1989.

7 MS. PARKER: Let me show you what
8 we've marked as Exhibit 55, which is a few
9 pages from that report.

10 (Wilkenfeld Deposition Exhibit
11 No. 55 was marked for
12 identification.)

13 THE WITNESS: I was an editor of
14 the chapter on regulation. I was not an
15 editor of the other chapters.

16 BY MS. PARKER:

17 Q Did you read the whole report?

18 A No.

19 Q Let me bring your attention to
20 page 139. Do you see that? Over in the
21 right-hand column, top of the page, the third
22 sentence there begins, "While there is

1 evidence." Do you see that?

2 MR. PATRICK: Again, I'm going to
3 object to the use of this document. You can
4 go ahead.

5 BY MS. PARKER:

6 Q Do you see that?

7 A Yes.

8 Q It says, "While there is evidence
9 that the long-term use of filter cigarettes
10 and low tar cigarettes may somewhat reduce
11 the risk of lung cancers" do you see that?

12 A Yes.

13 Q So the 1989 Surgeon General's
14 report reconfirmed again the review stated in
15 the 1981 report that low yield tar and
16 nicotine cigarettes offer some lung cancer
17 savings, correct? That's what it says?

18 A I don't know whether this is
19 historic or -- or current. From -- from this
20 I can't tell.

21 Q The Surgeon General in making that
22 statement would have relied on the

1 governmental numbers available at that time;
2 isn't that correct?

3 A The 1989 report was -- I like to
4 call it the silver bullet. It was an
5 anniversary edition that was supposed to have
6 been a compendium of everything that had been
7 compiled up to that time. So it didn't
8 always reflect current opinion. It gave a
9 historical view of everything that had
10 occurred from '64 to '89. I didn't review
11 this chapter. I don't know what that means.

12 Q Are you familiar with Dr. Jonathan
13 Samet?

14 A I recently read one of his
15 articles, but I don't know him personally.

16 MR. WILLIAMS: Samet.

17 THE WITNESS: I know who she meant.

18 BY MS. PARKER:

19 Q Are you familiar with the National
20 Cancer Institute?

21 A Yes.

22 Q As far as issues relating to

1 cancer, you would consider the National
2 Cancer Institute a reliable source, wouldn't
3 you?

4 A I would consider them one of the
5 reliable sources, yes.

6 (Wilkenfeld Deposition Exhibit
7 No. 56 was marked for
8 identification.)

9 BY MS. PARKER:

10 Q Let me show you Exhibit 56. That's
11 a few pages of Monograph 7 and you have
12 the entire Monograph 7 there in front of you,
13 don't you?

14 A Yes.

15 Q This is a chapter from the
16 Monograph 7, correct?

17 A Correct.

18 Q Dr. Samet cited studies conducted
19 by Dr. Ernst Wynder on page 80, correct?

20 A Under lung cancer you're talking
21 about?

22 Q Under lung cancer, the last

1 paragraph. He's citing to Wyinder, correct?

2 A Yes.

3 Q He wrote that "Reports from this
4 study have consistently shown that smokers of
5 lower tar products indexed in a variety of
6 ways have reduced lung cancer risk," and he
7 cites Dr. Wyinder, correct?

8 A Correct.

9 Q Correct?

10 A Yes.

11 Q Have you seen the study by
12 Dr. Tang, entitled, "Mortality in Relation to
13 Tar Yield of Cigarettes"?

14 A I don't think so.

15 (Wilkenfeld Deposition Exhibit
16 No. 57 was marked for
17 identification.)

18 BY MS. PARKER:

19 Q Let me give you a copy of what we
20 have marked as Exhibit 57. This is an
21 article that was published in December
22 of 1995 in the British Medical Journal,

1 correct? At the bottom of the page.

2 A Yes.

3 MR. PATRICK: Again, I'm going to
4 object to the use of the document, that this
5 is a medical article that's from Great
6 Britain. This is not in her area of
7 expertise. It's not listed on the
8 disclosure.

9 BY MS. PARKER:

10 Q If you look in the right-hand
11 column, the first full paragraph, "It is
12 reasonably certain," do you see that?

13 A Yes.

14 Q It says, "It is reasonably certain
15 that lower tar yields are associated with
16 reduced mortality from lung cancer." Do you
17 see that?

18 A I see that.

19 Q If you look on over at page 1533,
20 there's a little block that says, "Key
21 messages." Do you see that?

22 A Yes.

1 Q The very first key message it says,
2 "It is reasonably certain that smoking low
3 tar cigarettes rather than high tar
4 cigarettes reduces risk of lung cancer."

5 A That's what it says.

6 Q That's what it says.
7 If you look under the conclusion on
8 that same page, the very first sentence under
9 conclusion, "The article concludes that the
10 mortality from lung cancer was reduced by
11 about 25 percent for reduction of tar
12 of 15-milligrams per cigarette," correct?

13 A That's what it says.

14 Q Earlier this morning we talked
15 about Sir Richard Doll. Do you remember?

16 A Yes.

17 (Wilkenfeld Deposition Exhibit
18 No. 58 was marked for
19 identification.)

20 BY MS. PARKER:

21 Q Let me show you now Exhibit 58.

22 A Can I ask my lawyer a question?

1 Q Is it relating to the document?

2 A Absolutely.

3 MS. PARKER: Yes.

4 (Witness conferred with counsel)

5 MR. PATRICK: You have consistently
6 and continually asked her questions
7 concerning documents that she either has no
8 knowledge of, don't pertain to her area of
9 expertise or are totally irrelevant to what
10 she has been disclosed as far as her
11 expertise is concerned. I have objected to
12 the form of these questions in large part,
13 but in others because I realize that the
14 objections to questions, at least substantive
15 questions, and the method and mode of
16 interrogation is reserved until the
17 introduction of this deposition, if at all,
18 at the time of trial are, in fact, preserved.

19 I just think this is an exercise
20 and it's a waste of time because my feeling
21 is that none of this will be admissible at
22 trial and you simply are using her as a

1 sounding board for various quotes taken from
2 these documents.

3 With that being said, I have not
4 stopped the deposition. I mean I think
5 you're entitled to ask your questions. But I
6 don't think it's appropriate the way you have
7 asked the questions in terms of these medical
8 articles and other documents. So with that
9 being said, I mean you can continue to ask
10 questions, but I ask that you ask them
11 concerning documents concerning which the
12 witness has some knowledge.

13 MS. PARKER: We obviously have a
14 disagreement. We're going to go ahead and --

15 MR. PATRICK: We definitely have a
16 disagreement.

17 MS. PARKER: We're going to go
18 ahead and go forward.

19 BY MS. PARKER:

20 Q We talked about Sir Richard Doll
21 this morning. Remember?

22 A Yes.

1 Q You said he was someone that you
2 thought was authoritative and well respected,
3 correct?

4 A Yes.

5 Q Let me just bring your attention to
6 page 177, line 17 through 23.

7 A Truthfully I'm having trouble
8 reading it.

9 Q Let me read it for you and you can
10 follow along. Line 17, "Question: Now,
11 doctor, you believe that the case is made,
12 that is that it has been proven that lower
13 tar cigarettes reduce the risk of lung
14 cancer, isn't that correct?" His answer was,
15 "I think it's been proven beyond a reasonable
16 doubt that lower tar cigarettes do reduce the
17 risk of lung cancer to some extent." Do you
18 see that?

19 A Yes.

20 Q You don't disagree with him, do
21 you?

22 MR. PATRICK: I'm going to object.

1 I mean you can't ask --

2 THE WITNESS: I don't disagree with
3 him. I -- I can tell you that's -- you read
4 what was on that page.

5 BY MS. PARKER:

6 Q But my question is, do you disagree
7 or do you agree that it's been proven beyond
8 a reasonable doubt that lower tar cigarettes
9 reduce the risk of lung cancer?

10 MR. PATRICK: I'm going to continue
11 to object.

12 THE WITNESS: This is beyond my
13 area of expertise.

14 BY MS. PARKER:

15 Q Well, do you know one way or the
16 other as to whether lower yield tar and
17 nicotine cigarettes have an effect on
18 reduction of lung cancer?

19 A I can only tell you what others
20 have reported and what I have read, but it's
21 not my area of expertise.

22 Q So you're not disagreeing with

1 Dr. Doll, you're just saying that's not your
2 area; is that correct?

3 A This was made in 1997. I think
4 there is evidence that it's not true.

5 Q What is that evidence?

6 A The articles published by Michael
7 Thun and others on the increase in -- on the
8 failure to find a decrease in lung cancer in
9 the ACS 2 data.

10 Q Now, you've never conducted any
11 research with respect to cigarettes and lung
12 cancer, correct?

13 A I told you up front that -- that
14 I -- this is not an area I have any expertise
15 in. You said you wanted to know what I
16 thought. That's what I thought. It is not
17 based upon my -- my studies or -- in an area
18 in which I have expertise.

19 Q You also are not qualified to
20 review the studies and evaluate the studies;
21 is that correct?

22 A That's correct.

1 Q This afternoon we've been going
2 over a number of documents here. We went
3 over the Public Health Service 1996
4 document we went over the Elson and Betts
5 study and that was in 1972, we went over
6 Dr. Gori's 1978 conclusions?
7 A Doctor who?
8 Q Gori?
9 A I don't think we looked at
10 Dr. Gori.
11 Q Let me show you.
12 A I also don't know -- I know we
13 looked at Elson and Betts, but I have no idea
14 who those people are, but if you showed me
15 something by Gio Gori --
16 Q I'll do that. Just a moment,
17 please.
18 A Tell me what number it was.
19 Q Exhibit 50 on page 1759.
20 A Right. You did not refer me to
21 Dr. Gori's portion of that. You only asked
22 me about something that Ernst Wyinder said.

1 I didn't know Dr. Gori was a -- I told you I
2 was not familiar with this workshop and I
3 didn't know who was contributing to this.

4 Q We went over Dr. Hammond's 1980
5 work?

6 A Is that all you wanted on Dr. Gori?
7 I mean we're not going to --

8 Q Well, I've skipped now to ask you
9 about Dr. Hammond.

10 A I'm sorry.

11 Q We went over Dr. Hammond's 1980
12 work, correct?

13 A We didn't go over anything. We had
14 quotes from each one of them.

15 Q We went over quotes from that,
16 correct?

17 A We read quotes from each of those
18 articles, correct.

19 Q We went over quotes from the
20 Scarborough conference, of which you were a
21 part?

22 A Yes.

1 Q That was in 1985?

2 A Scarborough conference was in 1983.

3 Q Three. I'm sorry. Then we went
4 over the 1994 work by Dr. Samet, correct?

5 A We had one quote from Dr. Samet.

6 Q We've just gone over Sir Richard
7 Doll's 1977 testimony, right?

8 A Read the one quote from Richard
9 Doll in 1997.

10 Q Would you agree with me that for
11 the past 35 plus years the public health
12 community has advocated lower tar and
13 nicotine cigarettes to reduce the risk of
14 some diseases including lung cancer?

15 MR. PATRICK: I'm going to object
16 to the question. Lack of foundation,
17 overbroad.

18 THE WITNESS: Can I tell you what I
19 would agree with or do I have to say a yes or
20 no to that?

21 BY MS. PARKER:

22 Q Tell me what you would agree with

1 and then I'll follow-up.

2 A As evidenced by the Surgeon
3 General's report up to 1981, the Surgeon
4 General in the public health -- the public
5 health services said that less tar is better
6 than more tar and that although there is no
7 safe cigarette, if you can't quit, you should
8 try to reduce your intake of tar and that low
9 tar cigarettes might be the way.

10 After 1981 -- from 1981 on the
11 Surgeon General and the public health
12 authorities of the U.S. Government were much
13 more equivocal about that and you get
14 statements on both sides of the issue.

15 By 1983 you're beginning to get
16 real questioning going on. That's not to say
17 that there aren't people who even today would
18 continue to say that low tar cigarettes are
19 better than high tar cigarettes, but you'll
20 have just as many who will say there's no
21 benefit from low tar.

22 Q Well, would you agree that up

1 until 1981 it was clear that lower tar
2 cigarettes are better than higher tar
3 cigarettes for those people who smoke?

4 MR. PATRICK: Objection.

5 THE WITNESS: I think that what the
6 findings show is that filtered cigarettes
7 that were lower in tar produced a lung cancer
8 benefit as compared to unfiltered higher tar
9 cigarettes.

10 BY MS. PARKER:

11 Q Would agree that even from 1981
12 forward scientists, well-respected scientists
13 in the public health community have advocated
14 lower tar and nicotine cigarettes as a way to
15 reduce the risk of lung cancer?

16 A Some have.

17 Q Wouldn't you also agree that the
18 Government encouraged the development and the
19 marketing of low tar and low nicotine
20 products because of this potential for
21 reduction in disease?

22 MR. PATRICK: Objection. Vague.

1 THE WITNESS: I think the public
2 health -- the public health service and to a
3 certain exhibit the Federal Trade Commission,
4 and I think the Federal Trade Commission we'd
5 have to say did it unwittingly because it did
6 not have scientific expertise, assisted the
7 development of low tar cigarettes as a means
8 they thought of reducing the risk to those
9 who could not quit, but, as I say, it began
10 to change rather dramatically in the '80s.

11 BY MS. PARKER:

12 Q But you do agree that the
13 Government encouraged the development and
14 marketing of low tar and low nicotine
15 cigarettes?

16 MR. PATRICK: Objection. Asked and
17 answered.

18 THE WITNESS: I'd hate to believe
19 that the Government encouraged the kind of
20 marketing that occurred. I think they
21 encouraged the manufacturer by having the
22 numbers published, but I would be appalled to

1 believe that they encouraged the type of
2 marketing that occurred in the '70s and
3 the '80s.

4 BY MS. PARKER:

5 Q None of this marketing that you're
6 referring to was challenged by the FTC with
7 the exception of the Barclay and Carlton
8 issues, correct?

9 A I think that you might find in
10 reports that they were indications of
11 concern, but there were no cases brought in
12 the '80s.

13 Q My question was you referenced
14 advertising and marketing in your answer.

15 A Correct.

16 Q Of that advertising and marketing
17 that you referenced there were no challenges
18 by the FTC, there were no cases brought by
19 the FTC with respect to low tar, low nicotine
20 issues with the exception of the Carlton and
21 Barclay campaigns?

22 A That's correct. You had spoken of

1 the public health service and there were
2 concerns expressed about the marketing by
3 the -- the folks in the Department of Health
4 and Human Services, but they don't have
5 enforcement authority. Public health
6 community had concerns which they brought to
7 the attention of the Federal Trade
8 Commission. The Federal Trade Commission
9 didn't act.

10 Q But from 1979 all the way
11 through 1989 the Surgeon General maintained
12 the view to encourage the development,
13 manufacture and marketing of low tar, low
14 nicotine cigarettes?

15 A No, no.

16 Q You disagree with that?

17 A I disagree with that. I would say
18 in 1981 was the last time the Surgeon General
19 was on record as having a positive feeling
20 about lower tar. I think the 1989 report
21 really gave a historical perspective.
22 Granted they didn't say it's not, but I don't

1 think they were any more being positive.

2 Q We've talked about the public
3 health service. I want to ask you now about
4 the public health community.

5 A Okay.

6 MR. PATRICK: I'm going to object
7 to any questions about the public health
8 community as being overly broad and very
9 vague, but you can answer.

10 BY MS. PARKER:

11 Q In your work do you ever refer to
12 the public health community?

13 A Right, but I only know what they
14 bring to the commission as opposed to what
15 they were doing.

16 Q Well, wouldn't you agree, though,
17 that the public health community also
18 encouraged the development and marketing of
19 low tar, low nicotine cigarettes?

20 A You know, I don't know. I know
21 that by the time I took over the program
22 in 1983 they weren't. They were not willing

1 to -- well, we talked about -- we talked
2 about the Luken hearing in which they
3 criticized the commission's decision to
4 abandon the lab. At the same time they said
5 the numbers were worthless and that low tar
6 was a fraud but that the FTC should keep
7 testing.

8 I think there was a lot of
9 conflict. But from the time I took the
10 program on I did not hear from the public
11 health community that low tar should be
12 encouraged as a means of reducing disease.

13 Q You said a lot of conflict was
14 going on. Was that conflict within the
15 public health community?

16 A In their statements. The
17 statements were self-contradictory.

18 Q By the public health community?

19 A By spokespersons for organizations.
20 Like the -- the two quotes you had me read
21 from the American Lung and the American
22 Heart. The quotes you had me read had to do

1 with the reduction in lung cancer and we
2 ought to let the FTC continue it. On the
3 page before there were grave concerns
4 expressed about the low tar policy, so I mean
5 they were -- they had self-contradictory
6 notions within their own documents.

7 Q But, nevertheless, they were
8 encouraging the manufacture and development
9 of low tar, low nicotine cigarettes, right?

10 A By the '80s?

11 Q Yes.

12 A No, I don't think so, but, again,
13 I'm not an expert on that. I can only tell
14 you what they came to tell us at the
15 commission and that was do something about
16 the advertising. It's misleading people and
17 it's killing them.

18 Q Let me make sure I understand your
19 testimony. You're not qualified as an expert
20 to talk about the views of the public health
21 community in terms of whether or not the
22 public health community has advocated lower

1 tar and nicotine cigarettes?

2 A Probably not.

3 Q Do you consider yourself qualified
4 as an expert to talk about the views of the
5 Government other than the FTC with respect to
6 the development and marketing of low tar, low
7 nicotine cigarettes?

8 A Not up until -- yeah.

9 MR. PATRICK: Let me object to the
10 question and you can answer because you have
11 to answer unless I direct you not to answer
12 it. Then we have to go see the judge. But
13 you can answer it.

14 THE WITNESS: I -- you know, I
15 don't know what an expert means in this, but
16 I'm an expert of what went on at the Federal
17 Trade Commission. I can certainly testify
18 factually of what the reaction of certain
19 public health authorities were to the Federal
20 Trade Commission during the period I was
21 there and I feel somewhat expert about what
22 happened in the public -- public health

1 service from 1994 through 1999, which is when
2 I was part of the public health service.

3 I worked very closely with the
4 Office on Smoking and Health during the
5 periods in which I was the -- responsible for
6 the tobacco program.

7 BY MS. PARKER:

8 Q I have a question. Are any of
9 those documents that you brought with you
10 today that you say you're relying on any
11 company documents from R.J. Reynolds Tobacco
12 Company?

13 A Let's see.

14 Q Let me make sure this is on the
15 record. You're going through the set of
16 documents here?

17 A Yes, because I want to see you --
18 you asked me whether any of these were from
19 R.J. Reynolds.

20 Q Right, and I, if I heard correctly,
21 you did just review a document from Reynolds?

22 A Which we said was Rey -- and I said

1 it was not. I reviewed these and so -- the
2 way I read your subpoena, I was supposed to
3 bring everything I reviewed. So you got
4 everything I reviewed. Now, not everything I
5 reviewed is -- is terribly relevant, but I
6 wanted to be as inclusive as possible.

7 Q So are you saying that that R.J.
8 Reynolds document is not relevant to the
9 opinions you're going to give in this case?

10 MR. PATRICK: Well, why don't we
11 pull it out and you can take a look at it.

12 MS. PARKER: Well, my question is
13 to her.

14 THE WITNESS: I'll go back and look
15 at it then in a minute.

16 BY MS. PARKER:

17 Q There's a note on here that says,
18 "Less interesting"?

19 A Interesting, yes. Less interesting
20 than some of the others. I think this one
21 is -- yeah, Ernie. Ernie's a friend of mine.
22 I think this one is from RJR. I seem to have

1 three here. Let me just check one other
2 place. I think these are -- okay. There
3 seem to be three.

4 Q Could you hand those to me, please?

5 A Okay.

6 Q Is this one that you're just not
7 even relying on at all?

8 A No, it's not. I just brought it
9 because I looked at it.

10 MS. PARKER: I'm going to mark
11 these as the next three exhibits.

12 (Wilkenfeld Deposition Exhibit
13 Nos. 59 through 61 were marked
14 for identification.)

15 BY MS. PARKER:

16 Q That would be Exhibits 59, 60
17 and 61. I'm going to put these here and
18 we'll talk about those later. So just those
19 three documents?

20 A Yes.

21 MR. PATRICK: As it relates to
22 Reynolds.

1 THE WITNESS: As it relates to
2 Reynolds.

3 BY MS. PARKER:

4 Q As it relates to Reynolds.

5 A Yes.

6 Q Ms. Wilkenfeld, would you just take
7 just a moment and explain to me in a very
8 general way how the FTC test method works.

9 A How it works? You mean how the
10 entire process?

11 Q Tell me about it.

12 A Cigarettes are picked up randomly
13 across the United States in a 50 market
14 pickup to ensure that whatever regional
15 variations would have a wash. The cigarettes
16 are -- are then conditioned and placed in
17 a -- they have a conditioning room so that it
18 reaches a certain temperature and certain
19 humidity so that all the cigarettes are
20 usually -- are tested always at the same
21 types of conditions so that there won't be
22 any variation. They're then smoked in a -- I

1 think we smoked in a Filtrona machine that
2 had a port.
3 You put the cigarette in the port
4 held in place by a dental damn and a machine
5 takes a puff, I think it's a 35-millimeter
6 puff, every -- I'd have to look up the exact
7 numbers. The smoke is drawn through a filter
8 pad where it's collected. I think five
9 cigarettes per port are then smoked. The
10 pads are weighed before and after each --
11 each smoking.
12 The difference minus -- the
13 difference between the pad before and the pad
14 after, after you've subtracted moisture and
15 nicotine, is tar.
16 Q This test method you just described
17 was specifically designed to allow for a
18 comparison of tar and nicotine levels in
19 cigarettes that are smoked in the same
20 manner; is that correct?
21 A Yes.
22 Q The purpose of the FTC test method

1 today is the same now as it was when it was
2 first implemented back in 1967, correct?

3 A I'm sorry. Would you repeat that?

4 Q Sure. The purpose of the FTC test
5 method is the same now today as it was when
6 the test method was first implemented by the
7 FTC in 1967, correct?

8 A Two things. There's a buzzing. Is
9 there anything that can be done about that?
10 Thank you.

11 Thank you. The purpose. It's the
12 same test. If by purpose you mean why is the
13 commission doing it --

14 Q To allow a comparison of the tar
15 and nicotine levels in cigarettes that are
16 smoked in the same manner.

17 A I think the commission is
18 questioning at this moment in the last -- for
19 the last six years have been questioning what
20 the purpose of the test is and -- and that's
21 the whole reason for their having asked the
22 National Cancer Institute for a review, as

1 well as Department of Health and Human
2 Services.

3 Q Let me go back then and ask you
4 in 1967, okay, in 1967 the FTC test method
5 was specifically designed to allow for
6 comparison of tar and nicotine levels in
7 cigarettes that are smoked in the same
8 manner, correct?

9 A Yes.

10 Q Then I want to ask you about today.
11 Today the FTC test method also allows for
12 comparison of tar and nicotine in cigarettes
13 that are smoked in the same manner, correct?

14 A The test does the same thing now as
15 it did then.

16 Q There's no accurate way to measure
17 actual tar and nicotine intake on a general,
18 not an individual basis; isn't that correct?

19 A Could say that once more?

20 Q Sure. There's no accurate way to
21 measure actual tar and nicotine intake on a
22 general, not an individual basis; is that

1 correct?

2 A How can you have actual general? I
3 mean --

4 Q I said actual, not a general basis.

5 A You can -- you can measure actual
6 intake through cotinine and you can measure
7 general through population studies. Are you
8 asking if there's some way that the Federal
9 Trade Commission procedure could be modified
10 to -- or are you asking if there's any way?

11 Q Let me ask this: Do you agree that
12 there's no accurate way to measure actual tar
13 and nicotine intake on anything other than an
14 individual smoker basis?

15 A I don't understand the question.
16 I'm not trying to be difficult. Are you
17 saying is there a test that can derive an
18 average value that would good for all people?

19 Q I'll ask that first.

20 A No, you can't.

21 Q You cannot do that?

22 A Right, you can't come up with an

1 average that would be good for all people
2 using any test.

3 Q You can only test the individual
4 smoker's actual intake, correct?

5 A You can only test -- well --

6 MR. PATRICK: I'm going to object
7 to the question.

8 THE WITNESS: You know, I think
9 that -- I think that's what the FTC has asked
10 HHS to look at and they're looking at that
11 data and --

12 BY MS. PARKER:

13 Q Well, sitting here today do you
14 know of any such test?

15 A I know that -- I know that HHS is
16 looking to see what the answer to that
17 question is and I would hate to be put on
18 record as to what that -- you know, one of
19 the things that we did in our comment to FTC
20 was say look, you've got to look at this.
21 It's not working now. Look at it before you
22 decide where you're going forward.

1 So I have to stand on the fact that
2 what they were doing was not proper. What
3 they were planning to do was not proper. We
4 didn't have a recommendation to them what to
5 do as far as what was proper and that they
6 needed to go back and look at the data to
7 determine what type of modification, if any,
8 should be made, so --

9 Q Let me refer you back to what we've
10 previously marked as Exhibit 24 earlier,
11 which is the 1967 FTC news release.

12 A Yes.

13 Q Have you got it?

14 A Uh-huh, yes.

15 Q Let me bring your attention to the
16 second page, the third full paragraph. It
17 says, "Even with the same type of cigarette
18 individual smokers take a different number of
19 puffs per cigarette depending upon the
20 circumstances. When concentrating or
21 talking, the number of puffs is usually less.
22 When listening or required to listen to

1 another person talking, the number of puffs
2 per cigarette, as well as the duration of
3 each puff, usually increases. Smoking rates
4 while reading a book may differ from smoking
5 rates while viewing a television program.
6 The number of puffs and puff duration as well
7 as butt length will vary according to
8 emotional state." Do you see that?
9 A Yes.
10 Q That was from 1967, correct?
11 A Correct.
12 Q That was the FTC's own news
13 release, right?
14 A Correct.
15 Q So when the test method was
16 developed in 1967, it was not possible at
17 that time to determine a set of parameters to
18 define the average human smoking pattern;
19 isn't that correct?
20 A Correct.
21 MS. PARKER: If you look over on
22 page four of this next exhibit, which is

1 number 62.

2 (Wilkenfeld Deposition Exhibit
3 No. 62 was marked for
4 identification.)

5 BY MS. PARKER:

6 Q By the way, that's a letter to the
7 Federal Trade Commission, correct?

8 A That's what it appears to be, yes.

9 Q It's from 1966?

10 A Yes.

11 Q The letter is signed by Reynolds as
12 well as the other major tobacco companies?

13 A Yes.

14 Q If you look on page four of that
15 letter, the third full paragraph, it says,
16 "Whatever procedures are adopted by the
17 commission, the results will apply only to
18 that particular set of test conditions and
19 will not necessarily indicate relative smoke
20 yields to any particular smoker in view of
21 the wide variety of smoking patterns followed
22 by individual smokers." Do you see that?

1 A Yes.

2 Q This is from 1966, right?

3 A Yes.

4 Q So in 1966 even before the FTC
5 testing began, the FTC was made aware and
6 recognized that there are individual
7 variations in the way people smoke; isn't
8 that true?

9 A Yes.

10 Q In fact, the FTC had specifically
11 been told that information in this letter
12 from Reynolds and Reynolds' competitors,
13 right?

14 A Correct.

15 MS. PARKER: Let me ask to you look
16 at what we've marked previously as -- let's
17 see what number it is. Oh, we didn't mark
18 it. I'm sorry.

19 (Wilkenfeld Deposition Exhibit
20 No. 63 was marked for
21 identification.)

22 BY MS. PARKER:

1 Q We're at Number 63. Ask you to
2 please take a look at that. This is a
3 chapter written by Mr. Pillsbury, correct?
4 A Correct.
5 Q You referenced him earlier today,
6 right?
7 A Yes.
8 Q He's the person at the FTC who
9 checked on the TITL testing laboratory?
10 A Yes.
11 Q This is chapter two of Monograph 7;
12 isn't that correct?
13 A Correct.
14 Q Let me bring your attention over to
15 page 11, which is on the right-hand side of
16 that page. Let me read the sentence in the
17 last paragraph on that page. It begins about
18 the middle of the paragraph. "However, there
19 was simply no way to get that information."
20 Do you see that?
21 A Yes.
22 Q It says, "the FTC method did

1 provide a smoker with accurate comparative
2 information about the relative amounts of tar
3 and nicotine delivered by various cigarettes
4 when they were smoked in precisely the same
5 manner," correct?

6 A That's what he said, yes. That's
7 what he said.

8 Q The FTC did not believe according
9 to this exhibit that individual smoking
10 behavior was relevant to the testing
11 methodology stated purpose, did they?

12 A At that time, that's correct.

13 Q At that time is what year? The
14 time of Monograph 7, which is --

15 A No, I think he's referring to the
16 period of time in 1967.

17 Q We marked previously as an exhibit
18 and you previously acknowledged this morning
19 that you were involved in drafting the brief
20 that was submitted by the FTC in the Barclay
21 lawsuit, right?

22 A Which one? The District Court or

1 the Court of Appeals?

2 Q The District Court one.

3 A Yes, I reviewed it.

4 Q That was Exhibit 2. If you could
5 pull that out, please. Do you have it?

6 A Yes.

7 Q I want to bring your attention to
8 page eight of that brief. The first
9 paragraph, middle of the page, this is your
10 brief that you submitted to the District
11 Court, it says "FTC rankings then do provide
12 valuable comparative information to the
13 smoking population as a whole and to at least
14 some individual smokers if not to everyone."
15 That's what that says?

16 A Correct.

17 Q That's a brief you submitted
18 in 1983?

19 A That was the opinion of the
20 commission at that time. As I
21 indicated, 1983 was when information began to
22 be brought to the commission's attention

1 about the problems with the procedure.

2 Q Let me ask you to turn over to
3 page 29 of the brief, and that's a page that
4 has your name on it. Do you see there?

5 A It does indeed.

6 Q The first paragraph that actually
7 began on the prior page, the last sentence of
8 there says that the data that's reviewed
9 "establishes that the FTC system is a valid
10 relative predictor of human ingestion of tar
11 and nicotine." That's what that says, right?

12 MR. PATRICK: I'm sorry. Where are
13 you again?

14 MS. PARKER: Page 29.

15 MR. PATRICK: 29.

16 BY MS. PARKER:

17 Q "The FTC system is a valid relative
18 predictor of human ingestion of tar and
19 nicotine." That's what that says?

20 A That's what that says. The brief
21 argues that --

22 Q Well, if I could interrupt. All I

1 want to know is, is that what that says?

2 A That's what that says --

3 MR. PATRICK: That's what that
4 portion of the sentence says. In all
5 fairness, there's more to the sentence.

6 BY MS. PARKER:

7 Q Well, there's nothing else relating
8 in sentence that relates to the FTC system
9 being a valid relative predictor other than
10 with respect to the Barclay issue, right?

11 A If you want to know if that's what
12 that one sentence says, but that's -- that's
13 a highly -- that's what that one sentence
14 says.

15 Q This is the brief that y'all
16 submitted in 1983 to the Federal District
17 Court, right?

18 A Right. The testing showed that
19 there was a small but relative relationship
20 between tar and nicotine and FTC tar and
21 nicotine.

22 Q From the beginning the FTC

1 recognized that the FTC testing method was
2 not an accurate predictor of actual yield,
3 correct?

4 MR. PATRICK: What are you reading
5 from?

6 MS. PARKER: I'm not reading from
7 anything. I'm just asking her a question
8 right now.

9 THE WITNESS: You know, in the
10 beginning I think the FTC believed it was an
11 accurate predictor of yield if you smoked --
12 if you smoked in the same -- if you smoked
13 each cigarette the same. By the end of the
14 Barclay trial we no longer believed that.

15 BY MS. PARKER:

16 Q But that's what you believed?

17 A As we went into this, absolutely.

18 Q From 1967 to 1983?

19 A Well, I can only see what the --
20 the documents show. I know that --

21 Q Well, is that what the document
22 showed from 1967 to 1983?

1 A What was the statement again?

2 Q That the FTC recognized that the
3 FTC testing method was not an accurate
4 predictor of actual yield.

5 A Yield. Of an individual smoker?

6 Q Yes.

7 A Yes.

8 MR. PATRICK: It's now about 6:15.
9 I was wondering where we stand because it's
10 getting late in the evening.

11 MS. PARKER: I still have more
12 questions to ask.

13 THE WITNESS: Well, you said at
14 this point you would be able to determine
15 whether it was one hour or three hours or if
16 it wasn't going to get finished.

17 MS. PARKER: I'm not going to finish
18 my questioning today, but I don't want to
19 stop now particularly given that we thought
20 you would be available tomorrow and we got no
21 notice until today that you're not available
22 tomorrow.

1 MR. PATRICK: Well, what we're
2 going to do is go for another 15 minutes and
3 then we're going to stop for the evening
4 because I'm tired, I know the witness is
5 tired. I've got a plane to catch. I'm sorry
6 that you didn't have notice until today about
7 the unavailability tomorrow, but we will
8 produce her again at a later time that's
9 agreeable to the parties.

10 BY MS. PARKER:

11 Q Let me ask you to look at what we
12 marked previously as Exhibit 14, which was
13 the brief on appeal, and ask you to turn to
14 page 40, please.

15 A Yes.

16 Q Now, page 40 of that brief that the
17 FTC filed in the appeal your own expert,
18 Dr. Popper, pointed out in the Barclay matter
19 that absolute numbers have no intrinsic value
20 of their own except in the context of a
21 comparison; isn't that correct?

22 A He was testifying that -- that the

1 tar and nicotine testing ratings were indeed
2 comparative and had a -- only had comparative
3 function.

4 Q It's still not possible today to
5 define the average human smoking pattern;
6 isn't that correct?

7 MR. PATRICK: I object. This has
8 been asked and she's already answered.

9 THE WITNESS: The average human
10 smoking pattern. There's a nice little study
11 recently done at the American Health
12 Foundation which they tried to replicate the
13 smoking patterns of lots of smokers actually
14 using machinery I think similar to what the
15 industry does use and each one was different.
16 Now, whether you could get an average from
17 that, meaning you put them all together and
18 divide by seven, that you could do.

19 BY MS. PARKER:

20 Q Well, is there such a thing as an
21 average human smoking pattern? There's no
22 such thing is, there?

1 A Well, average merely means you take
2 everything and you add it and up and divide
3 by the number and if that's what you mean by
4 average, that's, in fact, possible. If -- if
5 by average you mean can you find something
6 that more people do than others, I think you
7 probably don't have a typical.

8 Q Let me ask it that way then. It's
9 not possible today to define a typical human
10 smoking pattern; isn't that correct?

11 A I'm not aware of a way to do that.

12 Q Now, you're familiar with EPA's
13 miles per gallon rating program, aren't you?

14 A Only as a consumer.

15 Q Do you know how that program works?

16 A My understanding is they go out and
17 they test the cars under certain
18 circumstances and then the -- the ratings are
19 disclosed given the set of circumstances
20 along with a disclosure that says your
21 mileage may vary depending upon how you
22 drive. Very consumer understanding. No

1 scientific understanding at all.

2 Q That provides useful information to
3 consumers, doesn't it?

4 A Consumers use it, I think, probably
5 beneficially.

6 Q Would you say that that rating is
7 not misleading because actual consumption may
8 vary, right?

9 A If I understand the EPA's mileage
10 guides correctly, you know if you drive
11 faster, you get this; if you drive slower,
12 you get that. You have control -- you have
13 knowledgeable control over how you vary it.
14 Given that, I think it is useful.

15 Q Do you have any reason to believe
16 that the FTC has a different view than you do
17 regarding the EPA's miles per gallon rating
18 program?

19 A I have no reason to believe that.
20 I know we didn't think it applied to tar and
21 nicotine.

22 Q Well, that wasn't my question.

1 There wasn't anything at all in my question
2 that asked for that information, was there?

3 MR. PATRICK: Objection. She can
4 answer the question however she feels to
5 properly answer it.

6 THE WITNESS: I have no reason to
7 believe that they -- that they do not find
8 the EPA's miles per gallon disclosure to be
9 anything other than consumer useful.

10 BY MS. PARKER:

11 Q So an automobile manufacturer
12 shouldn't be held liable in your view for any
13 disparity between the EPA rating and the
14 actual miles per gallon that they get?

15 MR. PATRICK: Objection.

16 THE WITNESS: You know, I guess
17 that would depend on why there would be a
18 disparity. I mean if the manufacturer of the
19 car knowingly cheated the system, I think
20 they should be held liable, yes.

21 BY MS. PARKER:

22 Q Well, you're aware, aren't you,

1 that the FTC has used this analogy of the EPA
2 miles per gallon program many times in
3 defending the validity of their tar and
4 nicotine testing program; isn't that correct?

5 A Can I give a full answer? I have
6 heard them do that and yet when asked to come
7 up with a disclosure that would be similar to
8 the one that came on EPA mileage guides, they
9 not only were unable, they were unwilling.
10 So whatever their -- whatever their reliance
11 on the EPA mileage guide, they were not
12 willing to carry through whatever -- whatever
13 the -- wherever that would lead them.

14 Q Well, in fact, you personally
15 approved of that analogy to defend the FTC
16 method by using an analogy to the EPA's miles
17 per gallon program, didn't you?

18 A In the Barclay case?

19 Q Well, I'm just asking generally.
20 Did you personally do that?

21 A I don't know --

22 MR. PATRICK: If you're going to

1 ask her if she did --

2 THE WITNESS: You know. If you can
3 point me to a place and I said it, then I
4 said it.

5 BY MS. PARKER:

6 Q Do you deny doing it?

7 A I can't either affirm or deny it.
8 I mean it was certainly commission policy and
9 I'm sure there are times when I would have
10 said it, but I don't have -- I can't tell you
11 if I did or when I did or why.

12 Q Well, look at the trial brief
13 again, Exhibit 2, pages six through seven,
14 and, again, this is the trial brief that has
15 your name on it that was submitted to the
16 Federal District Court in 1983, right?

17 A The trial brief does indeed use
18 that.

19 Q This is the trial brief that was
20 submitted with your name on it in 1983 to the
21 Federal District Court here in Washington,
22 right?

1 A Yes.

2 Q In that brief you told the District
3 Court that the FTC method was not unlike,
4 this is a quote, "not unlike the gasoline
5 mileage figures reported by the EPA, which
6 are not intended to represent the actual
7 mileage consumers will get from a particular
8 car which depends on individual driving
9 habits, the condition of the car, et cetera,
10 but only to provide a rating system by which
11 consumers can compare mileage performance for
12 automobiles driven in the same way." Isn't
13 that what your brief says?

14 A The brief is the brief of the
15 Federal Trade Commission. It was prepared by
16 the attorneys whose names are at the bottom.
17 It was --

18 Q Including yours?

19 A Including mine. To say that it's a
20 quote from me is improper. I can't -- I
21 don't disagree with it, but when a -- when a
22 Government attorney signs a brief, they are

1 signing their brief that this is the opinion
2 of their agency.

3 Q Well, you wouldn't have signed
4 anything that you knew was false or
5 misleading, would you?

6 MR. PATRICK: Objection.

7 THE WITNESS: I think I've -- I've
8 said I have no problem with that statement,
9 but statements made by a Government attorney
10 representing the -- their client represent
11 the views of the agency. If I had a problem
12 with it, I would have taken myself off the
13 case. But that doesn't represent my views.
14 That represents the views of the U.S.
15 Government and the Federal Trade Commission.

16 BY MS. PARKER:

17 Q Didn't take yourself off of that
18 case, did you?

19 A No, no.

20 MR. PATRICK: I think we're going
21 to stop here. I hate to unilaterally cut off
22 the deposition, but I think we need to deal

1 with these documents in some way and I need
2 to have some time to get out to the airport.

3 MS. PARKER: Well, let's go off the
4 record for the videotape but let's continue
5 on the record with the court reporter.

6 THE VIDEOGRAPHER: 6:25 off the
7 record.

8 MS. PARKER: But I want to continue
9 on the record with the court reporter.

10 Here's what I would suggest. I
11 would suggest doing the same thing we usually
12 do, we'll have the documents copied and,
13 Charles, I assume you want a copy as well and
14 B&W will want a copy. We'll have it color
15 copied so we'll know what's been highlighted
16 and what's been tabbed and I'll get the
17 originals back to Ms. Wilkenfeld but with a
18 copy to the court reporter.

19 THE WITNESS:

20 MS. PARKER: We'll actually send
21 the originals back to Mr. Patrick and he can,
22 in turn, get them to you.

1 THE WITNESS: Since I'm in town --
2 MR. PATRICK: Well, it would
3 probably be easier just to get it directly to
4 her.

5 MS. PARKER: We will do that.

6 MR. PATRICK: There's three RJR
7 documents.

8 MR. WILLIAMS: Yeah, I actually
9 wanted to keep a copy of these, too, but
10 they've already been marked as an exhibit,
11 so --

12 MR. PATRICK: I just want to make
13 sure that we knew what we were dealing with.

14 MS. PARKER: Since you have a FOIA
15 request --

16 THE WITNESS: Actually do you need
17 to keep this?

18 MR. PATRICK: Why don't you turn
19 that back on the exhibit pile here.

20 MS. PARKER: The exhibits go on the
21 exhibit pile.

22 THE WITNESS: So I don't get to

1 keep these either.

2 MS. PARKER: That's correct.

3 Since there are I believe you said
4 two FOIA requests pending --

5 THE WITNESS: I don't know. Is
6 that true?

7 MR. PATRICK: I don't know what the
8 status of the request is. We've been denied
9 I think or limited in the documents that we
10 turned over.

11 MS. PARKER: If we cannot complete
12 Ms. Wilkenfeld's deposition until we're able
13 to either find out that you're not going to
14 rely on those documents or if you are going
15 to rely on those documents, we need an
16 opportunity to see what those documents are.

17 MR. PATRICK: I think it may be a
18 moot point because I think the Government has
19 essentially turned over what they think --

20 THE WITNESS: Not in Brown &
21 Williamson. I don't think they turned over
22 anything in Brown & Williamson.

1 MR. PATRICK: Well, they have
2 responded inadequately I believe, but I'm not
3 the attorney dealing with that issue, so
4 we'll find out exactly where we do stand with
5 those documents.

6 MR. HOFFMAN: Well, let me ask a
7 question about that. Do you, Ms. Wilkenfeld,
8 have a copy of the FOIA request that was
9 submitted to the FTC?

10 THE WITNESS: If I do, it's in
11 there.

12 MR. HOFFMAN: But you don't know
13 whether it's in there?

14 THE WITNESS: Let's see. Do I have
15 the FOIA request. I don't think I have the
16 Brown & Williamson FOIA request.

17 MR. PATRICK: Why don't we do this,
18 we'll get you a copy and fax it over to you
19 tomorrow.

20 MR. HOFFMAN: As I understand it
21 then, the FOIA request with regard to Brown &
22 Williamson documents has not been resolved.

1 There are still some open issues as between
2 you and the FTC -- Ness Motley firm and the
3 FTC?

4 MR. PATRICK: I believe so. I
5 believe that only minimal documents were
6 produced by the Government regarding the
7 Barclay controversy, but I think what, in
8 essence, we asked for was the entire file and
9 we haven't gotten it.

10 MR. HOFFMAN: Well, my position
11 with regard to the Barclay issue, and it may
12 or may not be Ms. Parker's issue as well
13 because it might have some effect on her
14 client, but perhaps less so than mine, is
15 that we will want an opportunity to depose
16 Ms. Wilkenfeld after the Barclay documents
17 have been produced and she's reviewed them
18 and formulated whatever opinions she might
19 have based on those documents.

20 If that means we don't reconvene
21 the second day of this deposition until after
22 those documents are produced, that's fine

1 with me. But if you choose to reconvene the
2 second day of that deposition, we either need
3 to have assurances that she won't rely on any
4 documents other than those that have been
5 produced to date or assurances that we'll be
6 able to have a third day of the deposition
7 after those documents are produced.

8 MR. PATRICK: I understand what
9 you're saying.

10 (Whereupon, at 6:40 p.m., the
11 deposition of JUDITH P. WILKENFELD
12 was continued.)

13 * * * * *

